

A
DESCRIPTION
OF THE
COMMON LAWS
OF
ENGLAND.

DESCRIPTION

OF THE

COMMON LAWS

OF

ENGLAND.

According to the Rules of Art

compared with the Privileges of the King.

With the Substance and Effect of the Statutes
(disposed in their proper Places) by which the
Common Law is enlarged, enlarged, or any Ways
altered, from the Commencement of Magna
Charta, Anno 9 H. 3. until this Day.

By Henry Finch of Gray's Inn, Barrister at Law.

Originally written in French, and now translated into
English, with a Variety of Remarks to both the ancient and
modern Reports, and occasional Remarks where the Law
has been altered by later Statutes, or Acts of Parli-
ament, with many useful Observations also on various Points
of Law.

With a complest Table of the Principal Matters.

Printed and sold by J. Sturges, at the Sign of the
Three Kings in Pall-mall, near the Theatre-Francoise.
MDCCLXXII.

LONDON.
Printed for A. MILLAR, in the Strand.
MDCCLXXII.

*Note, the author's dedication
to James the first, omitted in
this edition.*

J. Langrave

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DESCRIPTION

OF THE

COMMON LAWS

OF

ENGLAND,

According to the Rules of Art,

Compared with the *Prerogatives* of the King.

With the SUBSTANCE and EFFECT of the STATUTES
(disposed in their PROPER PLACES) by which the
COMMON LAW is abridged, enlarged, or any Ways
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CHARTA, ANNO 9 H. 3. until this Day.

By *Henry Finch* of Gray's-Inn, Apprentice of the Law.

Originally written in FRENCH, and now first Translated into
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modern Reports, and occasional Remarks where the Law
has been altered by later Resolutions, or Acts of Parlia-
ment, with many useful Observations also on various Points
of Law.

With a compleat TABLE of the PRINCIPAL MATTERS.

Nunc alii intrepidè vestigia nostra sequantur;

Me duce plana via est, quæ salebrofa fuit.

*Major hæreditas venit unicuique nostrum a jure & legibus, quam à
Parentibus.*

CICERO.

LONDON:

Printed for A. MILLAR, in the Strand.

M.DCC.LIX.

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DESCRIPTION

COMMON LAWS

ET ALIA

OF THE

CHAP. 1



CONTAINED IN THIS BOOK

BOOK I

Of the Common Law
Of the Law of Nature
Of the Law of Nations
Of the Law of Kings
Of the Law of the Church
Of the Law of the State
Of the Law of the People
Of the Law of the Army
Of the Law of the Navy
Of the Law of the Merchant
Of the Law of the Soldier
Of the Law of the Sailor
Of the Law of the Peasant
Of the Law of the Craftsman
Of the Law of the Tradesman
Of the Law of the Merchant
Of the Law of the Soldier
Of the Law of the Sailor
Of the Law of the Peasant
Of the Law of the Craftsman
Of the Law of the Tradesman

OF THE COMMON LAW
OF THE LAW OF NATURE
OF THE LAW OF NATIONS
OF THE LAW OF KINGS
OF THE LAW OF THE CHURCH
OF THE LAW OF THE STATE
OF THE LAW OF THE PEOPLE
OF THE LAW OF THE ARMY
OF THE LAW OF THE NAVY
OF THE LAW OF THE MERCHANT
OF THE LAW OF THE SOLDIER
OF THE LAW OF THE SAILOR
OF THE LAW OF THE PEASANT
OF THE LAW OF THE CRAFTSMAN
OF THE LAW OF THE TRADESMAN

T H E
P R E F A C E.
T O T H E

STUDENTS of the LAWS of ENGLAND.

IF the Laws of England do deservedly surpass the Laws of all other Countries in the Perfection of their Nature, the Excellency of their Constitution, and especially in that Spirit of Freedom and Liberty which they breathe upon the Subject; there is yet an unpleasing Peculiarity of Fate attending them, such as perhaps no other Laws whatever are subject to. And that is, the chief and fundamental Books of our Law are for the most part handed down to us in dead and foreign Languages; and as formerly all the Proceedings and Pleadings in the Courts of Justice were in a foreign Dialect, so until late Years we can boast but of few extraordinary treatises, out of the innumerable Volumes, of the Law, which are delivered in our own native Tongue. And I know not whether any Law can labour under a much greater Disadvantage than that I have mentioned, which even at this time is sensibly to be felt with us, tho' we see the Disease mending upon our hands every day. The Laws of England in particular suffer much from this Circumstance, not only as it discourages some from taking that pains that is necessary to obtain

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obtain a compleat Knowledge of the Law (who are apt to neglect and disregard many of its most useful Parts, when they see them wrapt up in so unpleasing a Covering) but also as it renders a good Part of the Law in a great measure unintelligible to many others. Besides, I believe I may affirm, that the greatest Beauties of the Law are upon this very account buried and concealed, unless from a few pains-taking Men, that have Spirit and Resolution to dive into its inmost Recesses. For, notwithstanding a lazy Opinion that many have entertained to the contrary, it is most clear, that the oldest Law-Books, such as *Glanvill*, *Bracton*, *Britton*, *Fleta*, the *Mirror*, and the *Year-Books*, do contain the choicest and most precious Secrets of the Law, and that in them, as in a Mine, are hidden innumerable Stores of Riches. For truly is it said, * *That the Law is like a deep Well, and he that reacheth deepest seeth the amiable and admirable Secrets of the Law, wherein the Sages of the Law in ancient Times have had the deepest Reach.* Which Reason holds good also in the Works of Nature; for, *Out of the old Fields must come the new Corn* †. But whether it be out of an Opinion, that these and other old Law-tracts are grown obsolete and useless, or whether it be, that many are discouraged from undertaking them, being intimidated at the disagreeable Prospect of fighting with a dead Language, surely the Law does thereby lose much of its Beauty and Perfection, not to say what inconveniences it may lie under from the many Books of Reports, and other

* Co. Litt. 71. a. † 2 Inst. 22.

later Treatises written in *French*, whereof this excellent Book of great authority is an instance. Again, as in all Arts and Sciences a Man must first make it his Business to become acquainted with the first Principles and Grounds of the Art, so in the Study of the Laws of England it is necessary in a most especial manner; for without that he can give no Opinion, he can argue no Case, he can, in short, make no Figure as a Lawyer. And should it be said, that a Man may attain this in the more modern Books without troubling himself with the Language of those ancient Authors; I answer, that perhaps he may succeed there, but yet he only receives them at second hand, whereas in the others he has them from the Fountain-head; and after all he will find it pretty clear, that without an Acquaintance with the old Law-books no Man can make a compleat Lawyer; for it is not sufficient barely to understand how the Law is at this day, but the Student must know how it stood anciently, with all its successive Variations and Alterations, and the Causes of the same, without which he can never know the Reason of the Law (which is the Life of the Law) in any Case whatever: and for this he must necessarily have recourse to those ancient Sages of the Law, where he may see the very Origin and Fountain of the Law, and from them he may afterwards trace it through all its various Progressions and Improvements, as it were from the Size of a Molehill to the Bulk of a Mountain. I would therefore recommend the Student to the Acquaintance of these ancient Sages of the Law,

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whom,

whom, I own, I reverence for their Authority as well as Antiquity. Nor let him think them obsolete; for there is nothing he meets with in them or any other (however so out of Use it may seem at this Day) but will stand him in stead at one time or other. Let the Law be ever so old, so long as it stands upon its present Foundation, the earliest of its Authors will ever be in repute amongst those who are indefatigable in the Search after Truth. It were much to be wished therefore, that the Way to these old Fathers of the Law were made more facile and easy by their being rendered into our own Language, that that *Stumbling-block*, which has lain in the way of many, may no longer be a *Block of Offence*, to discourage the Student from searching into those hidden Mines of Treasure, which are concealed in the ancient Books of the Law, but that he may read every Author that hath written upon our Law. The Completion of so laborious a Work is too much to be expected in our Age, unless those that sit at the Helm should be persuaded to think it a Matter worthy their Regard and Consideration.

After having thus shewn the Emolument that would arise to the Students of the Law, as well as redound upon the Laws themselves, by all our Law-books being rendered into our own Language, it will be unnecessary to urge the Utility the Public will receive from the Translation of this Book, the great and undoubted Authority thereof (which has ever intitled it to the Esteem of all the Professors of the Law) being too well known

P R E F A C E.

known to need any Recommendation; and there is no Doubt, but the same Authority, which has raised it to so high a Rank in the Law, will be a Means of recommending it still more universally to the Favour and Acquaintance of the Students of the Law, now it has thrown off all Restraints, and is enabled to converse with them in a more free and affable Manner.

With regard to the Book itself, I might say a great deal in its Praise, and fall short of its Merit. There is a certain Peculiarity of Plan, which is quite original, and distinguishes it from any other Book that is written in the Law. And, what is its greatest Merit, it may be depended on as a sure Oracle, and an unerring Institute, for the Author has never alledged any Point, in which he is not backed by the greatest Authorities both ancient and modern, as the Reader will observe from the vast Number of References we have made; and I have remarked through the Book, that our Author's Opinion has never been impugned or contradicted by any weighty Authority, unless in three or four Places at most; and those either in Matters of mere Speculation and Curiosity, or in contested and perhaps unsettled Points, where, if he errs, other weighty Opinions err along with him. Add to this, that he has the Honour of being the first general Institute of the Laws of England, wherein he has not followed others, but has marked out the Way for others to follow him; he is not obliged for his Plan or Design to the Compilations of others, but many have compiled from him; and for the Subject-

Subject-matter of the Work, he has adhered to those only, whose Reputation and Authority have stood the Test of succeeding Times; being the *Year-Books*, *Plowden's excellent Commentaries*, *Dyer's Reports*, *Coke's Reports* (for none else of the *Lord Coke's Works* were in print at that Time) the *Register*, and *Fitzherbert's Natura Brevium*. And as this Book takes place of any other Institute in point of Time, so would I have it take place of them in point of Reading. And therefore I would recommend it to the Student as the very first Book he takes in Hand, at his Entrance upon the Study of the Laws of England. To which he may add the other *Finch's Law* now extant; which I shall take notice of by and by, and which I think very proper to be recommended as a leading Book. And when the Student has read these, and the *Doctor and Student*, he will be pretty well armed to set upon *Lord Coke's Commentary on Littleton*. But I would by all means discourage him from taking that Book in Hand first, because it is certainly too laboured and hard a Work for a Novice to understand, and it requires a very good Knowledge of the Law previous to it, to make it of any real Use to the Student.

There is another Treatise written by our Author in *English*, called *Finch's Law*; this, I fancy, was published in the Life-time of the Author himself, but is quite a different Book from the present, and wrote upon a different Plan, tho' for the most part the first Book thereof, and here and there some few Passages in the others (as must

must necessarily happen when they both flow from the same Pen) correspond with what we meet with here; but I have in this Edition sometimes referred to that Treatise, and as that was later in point of Time, I have distinguished it by the name of 2 *Finch*. As the same Hand composed both, there is no Doubt of the Authority of that later Treatise.

The Elegance and Peculiarity of Plan, that is remarkable in the first Part of this Book, has been particularly copied after in two later Treatises: the first is a small Book, called *Noy's Maxims*, which is chiefly so minute a Transcript of the first Part hereof, that it gives me Reason to think *Mr. Attorney Noy* had no hand in that Book, but that at least so much of it as corresponds with this must be the Plagiarism of some other Person. The other is *Wingate's Maxims*, which has followed our Author *verbatim* at the Beginning; and that whole Book is evidently an Enlargement upon the Rules and Method laid down in the first Part of this.

The Translation of this Book was originally done for my own private Use; but finding it contained Matter of excellent Authority, I resolved to print it for the public Good; and I once thought of ushering it into the World under the Patronage of some bright Ornament of the Law, which would naturally have fallen to *The Right Honourable LORD MANSFIELD, LORD CHIEF JUSTICE of ENGLAND*. But my original Design not being to commence Author, and relying upon the
6 known

known Worth and Character of the Book, I left it to its own Recommendation.

The TRANSLATOR.

N. B. In this Impression the Folios of the *French* Edition are placed in the Margent; and as there is in that Edition a Chasm from Fo. 23. a. to 31. b. inclusive, as well as from Chap. 2. to Chap. 9. inclusive in the Second Book, we have here in the Margent and Chapters filled the same up in their numerical Order; by which Means there ensues a Repetition of the same Number of Folios and Chapters, which we have distinguished by Asterisks.

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A
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OF THE
C H A P T E R S

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ADVER.

ADVERTISEMENT.

SINCE this Book was printed off, a new Edition of the English *Finch's Law* has appeared, which, as it bears the same Name with this, and both were wrote by the same Author, it may be proper to acquaint the Public, that these are not the same Book, but that this is a Translation of the Original *Finch's Law* written in *French*, and though these do for the most Part correspond in the first Book, yet they differ very materially in the rest, not only in Substance (this being much more full and comprehensive under almost every Title, and especially in the Fourth Book, which treats of the Law of the Admiralty and the Spiritual Law, which the other does not) but also in the Form, and Plan of the Work, as may be distinguished, by comparing the Tables of the Chapters in each Book.

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First Book of L A W.

CHAP. I.

Of the Law of Nature.

LA W is the Rule to give to every Man that which belongs to him ^a.

All Laws are Divine or Human. Divine Laws are founded upon Holy Scripture, and do belong to another Treatise. Human Law, is that which is for the well governing of Civil Society.

In the Greek it is called νόμος ἀπὸ τῆς νέμειν *a distributing*, because it distributes right to every one: In Latin it hath the Name of *Lex*, not *a ligando*, as some ^b will have it, altho' it is true that the Law is the *Bond* of the State; nor *a legendō*, that is, *to read*, altho' Bracton ^c much approves thereof; but as Marcus Cicero ^d, who knew better, derives it *a legendo*, which is, *to make Choice*, in respect of the Choice and exquisite Wisdom that is in the same. For, saith he (speaking of the Græcians) as they made Equity the Characteristic of the Law, so we place it's Characteristic in the Choiceness with which it abounds: And both of these are

^a Dawson's Orig. of Laws, Fol. I. ^b Dr. & Stud. lib. 1. c. 4.
^c Isidor. Etymol. lib. 2. c. 10. ^d Bracton, lib. 1. c. 3. ^e Cicero de legibus, lib. 1.

the Property of the Law. The Hebrews call it *Tho-rah*, of the Root *Jarah*, which, in *Hiphil* being *Ho-rah*, signifies to shew or direct. For that the Law is the Teacher of Truth, as Plato saith^e, *Leges ad hominum doctrinam ponuntur*. So that the Law implies in it, and as one may say, incloses in it's Name and Nature, all the three Laws which are the ἐγκυκλοπαιδεία, [b] and the Golden Chain of all good Learning, viz. the Law of Truth, the Law of Justice, and the Law of Wisdom. Wherefore it is not only ἐπιστημη *Scientia*, but ἐπιστημονικωτάτη *Scientificissima*. Whereof Plato saith^f, *nomen menti consentaneum possidet divina nobis & admirabilis lex*. Our divine and admirable Law doth in it's Name resemble much the Deity, for that was the Object which the Philosophers intended by their νῦς or *Mens*, being the Essence of Truth, Prudence, and Justice. So that the Name shews the Author from whence the Law comes, and as the Poet saith,

Qui tanti talem genuere Parentes.

These Laws are either Natural or Positive. So says Cice-ro in his Oration for Milo. *Est enim hæc non scripta sed nata lex, quam non didicimus, accepimus, legimus, verum a naturâ ipsâ arripuimus, hausimus, expressimus, ad quam non docti, sed nati, non instituti, sed imbuti sumus*. Also, in his first Book de *Legibus* he saith, *Constituendi vero Juris ab illâ summâ lege capiamus exordium, quæ seculis omnibus ante nata est quam scripta lex ulla*. Where he calleth the Law natural summam Legem, as the Fountain from whence all other Laws do issue.

Natural, are those Laws which we have of ourselves, and for this Cause they are^g general to all Men, and immutable^h.

These are of two sorts, according to the two grand Luminaries, which God hath fixed in the Firmament of our Hearts, viz. Nature and Reason.

^e Plato de legibus. l. 9. ^f Plato de Repub. l. 4. τῆνομα νῦν προ-
σῆκον κερτηκάν ὁ θεὸς ἡμῖν καὶ θαυμαστὸς νομὸς. ^g Aristot. lib. 5. Ethic.
Jus naturale est quod apud omnes Homines eandem habet potesta-
tem. Fortesc. cap. 16. ^h Calvin's Case. 7. Co. 13. b. Bracton,
lib. 1. c. 5. Dr. & Stud. l. 1. c. 2. Carter's Rep. 130.

For being peculiar to Man, in that he is Man, and a reasonable Creature, they may be divided, as Reason itself is divided. Those who have laboured most in the Grounds of Nature, do distinguish this surpassing Faculty of Reason, which Man alone of all Creatures upon Earth possesses, into two other Faculties, viz. *νῆς*, that is, the Understanding, and *διάνοια*, that is, the reasoning Part. *νῆς* they call that Faculty of the Soul, which offers to our Intelligence, Things clear and self-evident; and by *διάνοια*, they intend that Faculty of the Soul, which by rational Conclusions, deduces one Thing from another. By this it is, that the Masters and Professors of the Art of Thinking make Judgment, which is a Flower of Reason; and in Effect, nothing more than the Conjunction of Reason, to be either Nocticum or Dianocticum. According to which Diversity, we may distinguish the Laws, which we have called the Laws Natural, and which are the Foundation of all other Laws, into Primitive (which is their Nocticum, with us the Law of Nature) or into secondary Rules of Reason (which they call Dianocticum, with us, the Law of Reason.) And both these Names, viz. *νῆς* & *διάνοια*, or *λόγισμ* (which are all one) Reason, and the Deductions of Reason, do Plato and Cicero, when they speak of Laws, ascribe unto them.

The Law of Nature is that sovereign Reason im- [2]
printed in the Nature of Man, which ministers the common Principles of Good and Ill¹.

And this in effect is no other than the *κοινὰς ἐννοίαι*, or common Notions, whereof the Philosophers so much dispute; that a Man ought to do Good to every one, but to do Evil to none: That we ought not to do unto another, that which we would not another should do unto us: That Men ought to live peaceably together: That Right should be done to all, but Injury to none: And others of like Nature.

Such are also the Moral Laws of God; that we ought to honour our Father and Mother; avoid Mur-

¹ Cicero de Legibus, l. 1. Lex Naturæ est ratio summa, insita in Hominis Natura, quæ jubet ea quæ facienda sunt, prohibetque contraria.

THE FIRST BOOK

der, Adultery, Theft, False Witness, &c. Of these, saith Cicero, in his second Book de Legibus, Principem illam legem et ultimam mentem esse dicebant; where he also calls this the high and supreme Law above all others; and in another Place, Naturæ juris ab omnibus repetenda Natura. For that the Light thereof, as the Light of the Sun, shines very clearly, and is to be seen by all.

CHAP. II.

Of the Law of Reason.

[b]

THE Law of Reason is that which deduces Principles by the Discourse of sound Reason. Hereof saith Cicero^k, Ratio, cum est in Mente Hominis confirmata et confecta, lex est: And again, Lex est radius divini Luminis et recta ratio summi Jovis. Plato^l, by way of poetical Fiction, imagines, that at first there were two contrary Humours reigning in Men, which as two Tyrants of his Counsel governed him, viz. Pleasure and Pain. Each of these had two other Passions attending upon them, the hope of good Things to come, and the fear of Evil; and by these, Men were drawn and pulled this way and that way, and diversly distracted; therefore to govern both, the Deity put in Man λογισμὸν the reasoning and discoursing Part, to shew him what is good or ill in either of them; which he calleth τῆ λογισμῷ ἀγωγὴν χρυσὴν καὶ ἱερὰν, the golden and sacred Rule of Reason. And we may call it the incorrupt Reason which Adam had at first in its full Perfection; but by the Fall of Adam, which introduced Sin into the World, and, as the natural Fruit of Sin, blindness and corruption of Nature, this excellent Image of Reason is now so wonderfully defaced in the wisest of Men, that the Light thereof, as the Light of the Moon, shines very darkly, but yet in such manner, that from this all other Laws have received their Light.

^k Cicero de Legibus. l. 1.

^l Plato de Legibus, l. 1.

And

OF LAW.

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And so we have grounded upon this Law, more or less clearly, divers Rules of Reason, which always stand for indubitable Oracles; and being confirmed by Judgment, Learning and great Experience, and being well and rightly applied, they are as so many Stars and shining Lights; and, as a Man may truly say, they tell us how to direct our Course, when we argue any Case. Such, and so great is the use of these Rules, that as Lords Paramount, they rule and over-rule the Grounds themselves. And sooner than any of these (I mean regularly) shall fail, the Maxims and Principles themselves of the positive Law shall give place, as to a higher and more perfect Law.

CHAP. III.

Of Rules taken from other Learning.

[3]

AND these Rules of Reason are of two sorts; some taken from foreign Learning, as well divine as human; the rest proper to the Law itself.

Of the first sort are the very Principles and sound Conclusions of foreign Learning, taken out of the Heart, and as it were, the very Bowels of Theology, Grammar, Logic, also of Philosophy, Physics, Politics, Economics, Ethics. For altho' in our Annals and Books of Reports these are not mentioned, nor spoken in the same Terms, yet the Things which you shall find there, are of such sort; for the Sparks of all Sciences in the World are covered in the Ashes of the Law. So that it is well said of one ^m, Non ex Prætoris edictis, neque a duodecim tabulis, sed penitus ex intimâ Philosophiâ haurienda juris disciplina est. He that will take before him the whole Body of the Law, and proceed therein with Profoundness and Judgment, will not lay the Foundation of his Edifice upon Estates, Tenures, the Nature of Writs, and such like, but upon the current and sound Principles, of which our Books are full.

^m Cicero de Legibus, lib. 1.

THE FIRST BOOK

First of Theology, or the Doctrine of Religion, the Chief and the Master-Piece of all that follows; of which St. Austin saith very truly^a, *Omnium Legum est inanis censura, nisi divinæ legis imaginem gerat.*

Upon this Head we have these Rules.

1. *Summa ratio est quæ pro Religione facit* ^o.

The Statute of 1 Eliz. (not printed, but see it in Raftall, Leases 4) proves, that Acts, which restrain Ecclesiastical Persons from wasting their Possessions, which were given to maintain the Service of God, had bound the King, unless special Provision had been made to the contrary, by the same Act^p.

Upon a Tenure to find a Preacher in such a Church, and the Lord purchase Parcel of the Land, yet the whole Service remaineth; for it is for Advancement of Religion, and the Service of God^p.

[b] 2. *The Holy Scripture is of sovereign Authority*^r.

If a Statute were made directly contrary to the Law of God, as if it was ordained, that none should give Alms to any one in whatever Necessity he was, such Statute should be void^s.

3. *Dies Dominicus non est Juridicus.*

Upon a Fine levied with Proclamations according to the Statute of 4 H. 7. c. 24. If any of the Proclamations be made upon a Sunday, all the Proclamations are erroneous^t, because the Justices ought not to sit on the Sabbath Day, but that Day is exempted from such Business by the Common Law, in respect of the Solemnity thereof, to the intent that all Men may apply themselves to Prayer, and to honour God upon that Day.

Pleas may not be held in fifteen Days of Easter, because that is always Sunday, which is the Sabbath-Day, but they shall be holden on the Morrow of Fifteen Days of Easter^v.

^a August. de Civitate Dei, lib. 9. ^p Wing. Max. 3. ^p 5. Co. 14. b. ^r 6. Co. 2. ^a 2. Co. Lit. 149. a. ^r 34 H. 6. 40. Prifot. a tiels Leys que eux de Saint Eglise ont en auncient Scripture, covient pur nous a doner credence, carceo est common Ley sur que tous manner Leys sont fondues. 8 H. 8. Fineux, Ley de Dieu est Ley de Terre. ^s Dr. & Stud. lib. 1. c. 6. ^t Plowd. 265. ^v F. N. B. 17. f. Dyer 154 pl. 16.

OF LAW.

7

If a Teste of a Writ of Scire Facias out of the Common Bench be upon a Sunday, this is Error, for that is not Dies Juridicus in Banco^w.

A Sale upon a Sunday shall not be said a Sale in Market-overt to alter the Property of Goods^x.

4. The Rules taken from Grammar, are infinite in the Etymology of the Words, and in the Syntax, or Construction of them, whether their Nature be single or joined with others.

5. *Ad Proximum Antecedens fiat relatio^y.*
And others without Number.

Indictment^z, that Elizabeth was in Peace, &c. until A. the Husband of the aforesaid Elizabeth of D. in the County of S. Yeoman, murdered her, is good; for Yeoman is an Addition proper to a Man only, and therefore here the Term necessarily refers to the Husband. But an Indictment^a against Alice S. of D. in the County of S. Wife of J. S. Spinster, &c. is not good; for Spinster being an indifferent Addition to Man or Woman, ought to refer to J. S. who is the next Antecedent, and so the Wife hath no Addition.

Indictment against J. S. Servant of J. D. of D. in the County of Middlesex Butcher, &c. is not good, for Servant is no Addition, and Butcher refers to J. D. which is the next Antecedent^b.

OF LOGIC.

Of the Maxims of Causes and Effects.

6. *Cessante Causâ cessat effectus.*

If the King grant an Office at Will, and also £10. Fee for his Life, for the Maintenance of his Office, if the King oust him out of the Office, the Fee shall cease^c.

Neither the Executor, nor the Husband (after the Death of the Wife, Guardian in Socage) shall have the Ward^d, for the Guardian hath not the Wardship here to his own use, but for the Benefit of the Heir; and the Executor, or the Husband, have not the Af- [4]

^w Dyer 168. pl. 17. ^x 12 Ed. 4. 1. b. Brian. ^y Wingate's Max. 11. & 15. ^z Dyer 46. b. pl. 2. ² Hal. Hist. pl. cor 177.
^a Dyer supra. ^b 9 Ed. 4. 48. Dyer supra. ^c 5 Ed. 4. 8. b.
^d Plowd. 293. 294. Post. 44. a. Co. Litt. 89. a. 351. a.

fection which the Testator or his Wife had, which was the Cause that the Law gave to them the Ward.

Where a Wound is given the first Day of May, and the King pardons him the second Day of May for all Felonies and Misdemeanors, the Party wounded dies the third Day of May; altho' such Act is not a Felony till after the Pardon, yet the Felony is pardoned, because that the Misdemeanor is pardoned, and therefore every thing that followed thereupon is also pardoned^e.

The King hath a Ward *pur Cause de Gard*, and afterwards makes Livery to the first Ward, now the second Ward shall not sue Livery^f.

It is no principal Challenge to a Juror, that he had married with the Mother of the Party, if she died without Issue by him, because the Cause of the Favour is removed^g.

Now Things are construed,

7. *According to the original Cause thereof.*

To make a Man swear to bring me Money upon Pain of being killed, and he brings it accordingly, is Felony^h.

To make a Man swear to surrender his Estate, who doth so, this is a Disseizinⁱ.

To imprison one in M. until he makes an Obligation, and he makes it to R. when he is at large, yet it shall be void for Duress of Imprisonment^k.

Outlawry in Trespass is not a Forfeiture of the Land, as Outlawry in Felony is, for altho' the Non-Appearance is the Cause of the Outlawry in both, yet the force of the Outlawry shall be esteemed according to the Heinousness of the Offence, which is the principal Cause, and Foundation of the Process^l.

A Man and a Feme Sole have a Villain, and after they intermarry, and the Villain purchases Lands, now they shall have this Purchase, not by Entierties, but by Moieties jointly, or in common, as they have the Villain.

^e Plowd. 401.

^f 13 Ed. 4. 10.

^g Co. Litt. 157. a.

14 H. 7. 2.

^h 44 Ed. 3. 14. b.

ⁱ 14 Aff. pl. 20.

^k 21

Ed. 4. 68. b.

^l 3 Ed. 3. 84.

8. *According to the Commencement thereof.*

If a Servant^m being out of the Service of his Master, kill his Master for Malice which he had against him when he was his Servant, this is Petit Treason.

A. erects a Shop upon the King's Land, and afterwards the King grants the Land to B. in Fee. A. before Entry or Seizure of the Shop by the Patentee continues his Possession, and dies seized, yet this is no Descent to take away the Entry of the Patentee; for by his first erecting of the Shop, he may not gain any Freehold against the Kingⁿ.

9. *Derivativa Potestas non potest esse major primitiva.* [b]

The Attorney of the Disseizee shall not make Claim but upon the Land, if the Disseizee himself durst go to the Land^o.

The Bailiff of a Disseizor shall not say, that the Plaintiff hath nothing in the Land, for the Master himself shall not have such a Plea, because he is not Tenant of a Freehold^p.

The Servant shall be estopped to say, that the Freehold is in his Master by Recovery against his Master, altho' the Servant is a Stranger to the Recovery, for he shall not be in a better Plight and Condition, than he in whose Right he justifies^q.

10. *Things grounded upon a bad and void Beginning can never be made perfect; or Quod initio non valet, tractu temporis non convalescet,*

If an Infant or Feme-Covert make their Will, and publish it, and afterwards die, being of full Age or Sole, yet the Will is void^r.

Disseizee of two Acres in D. releases to the Disseizor all his Right in all the Lands in D. and delivers this to a Stranger as an Escrow to be delivered over as his Deed such a Day, and between this and the Delivery over, the Disseizor disseizes him of another Acre in D. nothing of the Right of the third Acre passes by the Release.

^m 37 Aff. pl. 7. Plowd. 260. ⁿ Dyer 266. pl. 10. ^o Little. Sect. 419. 421. ^p 28 Aff. pl. 24. ^q 2 Ed. 4. 16. ^r Plowd. 344. Godolphin Orph. Leg. fo. 23. 29.

THE FIRST BOOK

11. *Unum quodque dissolvitur eo modo quo colligatum est.*

An Obligation or other Matter in Writing, may not be discharged by Parol Agreement^s.

In Annuity by Prescription *rien arere* is a good Plea, for Prescription is Matter in Fact; but in Annuity by Deed it is no Plea, without shewing an Acquittance^t.

When a Man avoids the Title of the King by as high Matter of Record as the King claims, he shall have this by way of Plea, without being put to his Petition, although that the King be entitled by double Matter of Record: As where a Man is attainted of Treason by Parliament, and an Office found what Lands he hath, by which the King seizes them, the Party may alledge Restitution by Parliament, and a Repeal of a former Actⁿ.

12. *He that claimeth on high, shall neither have gain nor loss thereby.*

If one Jointenant makes a Lease for Years of his Moiety reserving Rent, and dies, the other who survives shall have the Reversion of the Moiety, but not of the Rent, for he comes in by the first Feoffor, and not under his Companionⁿ.

So where a Husband being Lessee for Years in Right of his Wife, makes a Lease of part of the Term, rendering Rent^s.

An Executor recovers and dies Intestate, Administration of the Goods of the first Testator is committed [5] to J. S. J. S. shall not sue Execution upon the Recovery^s.

Dower may not be assigned, reserving a Rent, or with a Remainder over, for she is in by the Husband, and not by him, who assigns Dower^s.

13. *According to the end thereof.*

Vouchee cometh into Court to be viewed, and being viewed, is awarded of full Age, yet he shall not be

^s 19 Ed. 4. 1. b. ^t 5 H. 7. 33. ⁿ 4 H. 7. 7. b. Post.
128. b. ^w Dyer 187. pl. 5. Co. Litt. 185. a. 318. a. ^s Post.
18. b. ^r 26 H. 8. 7. ^a Plowd. 25. Pollard. Dyer 153.
pl. 13.

compelled

compelled to answer until he cometh in to that Intent by other Proceſſ^b.

Vouchee upon the Grand Cape ad valentiam ſhall not loſe the Land, altho' he cannot ſave his Default; for the Proceſs is only to the intent that he may appear^c.

Where a Man is ſummoned to answer to a Matter in a Writ, there he ſhall not answer to any other Matter than that which is contained in the Writ^d. And altho' the King be Party, ſo that this ſhould be answered againſt him; as if Office be found that Lands in chief deſcend to J. S. a natural Fool, and that A occupies the Lands, by which in a Scire Facias againſt A to answer wherefore the Lands ſhould not be ſeized into the King's Hands for Cauſe of Ideocy, he pleads that J. S. when he was of ſound Memory, releaſed to B who infeoffed him, without that, that he is a natural Fool; this is good without ſhewing any Liſenſe of Alienation to diſcharge himſelf for the Purchase of the Lands.

Of the Maxims touching Subjunets and Adjuncts, is,

14. *Debile fundamentum fallit opus.*

Upon the Diſſolution of a Spiritual Corporation whereunto a Church is appropriate, the Church becomes diſappropriate^e.

The Lord confirms the Eſtate of the Diſſeizor to hold free^f, this, after the Recovery of the Diſſeizee ſhall be Ancient Demefne again, for the Eſtate, upon which the Confirmation enured, is defeated.

When the Eſtate^g to which a Warranty is annexed, is defeated, the Warranty is alſo defeated. As if Tenant in Tail diſcontinue, and the Diſcontinuee be diſſeized, or make a Feoffment upon condition, and a collateral Anceſtor of the Iſſue in Tail releaſe to him in whom the Poſſeſſion is, and die, the Iſſue in Tail is barred; but if the Diſcontinuee enter upon the Diſſeizor, or upon the Feoffee for the Condition broken, the Iſſue is reſtored to his Formedon^h.

^b 31 Ed. 3. Fitz. Joinder in Aid 10. ^c 19 Ed. 4. 3. ^d 50 Aff. p. 2. ^e 3 Ed. 3. 74. ^f 49 Ed. 3. 8. ^g 44 Aff. pl. 35. 10 Co. 96. b. Co. Lit. 389. b. Carter 240. ^h Littlel. §. 741, 742.

15. *Incidents may not be severed.*

Where a man grants Wood to be burnt in such a House, he who hath the House, by whatever Title he hath it, shall have the Wood, for it is an incident inseparable to the otherⁱ.

Lord and Tenant by Fealty and Homage, the Lord releases his Fealty; this is void, for Fealty is an Incident to Homage^k.

[b] An Office of Skill and Diligence, or an Annuity *pro consilio impendendo*, may not be forfeited by Attainder of Treason^l.

A Court Baron is incident to a Manor, and a Court of Piepowders to a Fair; and therefore a Man may not grant the Manor or Fair reserving the Court^m.

A Man grants his Service of Castle-gard, and retains the Castle in his hands; this is voidⁿ.

16. *Some Things by reason of others, become in the same plight with them.*

A Custom^o which runs with the Land, as Gavel-kind, Borough English, or the like, shall not be extinguished by Unity of Possession, viz. of the Tenancy with the Signiory.

Erroneous Recovery suffered of Lands in Borough English, the youngest Son shall have a Writ of Error, because he is Heir to the Land. So it is of all the Sons, if the Land be Gavel-kind^p.

If one Coparcener covenant upon Partition with another and her heirs, to discharge the Land of a Suit, and the other alien her Part, the Alienee shall have a Writ of Covenant^q.

17. *Personal Things cannot be done by another.*

Suit of Court may not be done by another^r.

A Man may not excuse himself of Contempt in not serving the King's Process or the like by Attorney, but it shall be in his proper Person^s.

18. *Personal Things cannot be granted over, as Matters of Pleasure, Ease, Trust, and Authority.*

ⁱ Plowd. 381. Co. Litt. 121. b. F. N. B. 181. 5 Co. 17. b.
^k 7 Ed. 4. 11. b. ^l Plowd. 379. Dyer 2. pl. 2. ^m 19 H. 8.
 Bro. Incidents, 34. ⁿ 31 Ed. 3. Affize 44. ^o 14 H. 4. 5. p. F.
 N. B. 21. 1. 3 H. 4. 19. 9. H. 7. 24. contra. ^q 42 Ed. 3. 3.
^r 7 H. 4. 19. ^s 22 Ed. 4. 34.

A License to hunt in my Park, to go to Church over my Land, to come into my House to eat and drink with me, may not be granted over ^t.

So where a way for life is granted over my Land ^u.

Patentee for Life of an Office of Trust, as to be Chamberlain of the Exchequer, Squire of the Body, or the like, may not assign this over, except it be specially limited in his Patent that he may do it; for otherwise he will perhaps grant it to one whom the King cannot trust, or who will be negligent, &c ^w.

The Keepership of a Park, Stewardship, Bailiwick of Husbandry, &c. for Life, may not be granted over, for that they are Offices which require Skill and diligence ^x.

A licenses B to do an Act, B may not grant this License to another ^y.

Upon a Warrant of Attorney made to J. S. to deliver Seizin, he may not grant this Authority over ^z.

19. *Personal Things die with the Person.*

When a corporal Damage is done to a Man, as Battery, &c. if he himself or the Party who did the Battery die, the Action is gone ^a.

Lessor covenants to pay Quit Rents during the Term, his Executor shall not pay it, for it is a personal Covenant, which dies with the Person ^b. [6]

Amongst those Arguments that differ,

First of those which differ only in a certain Respect and Reason, not in Fact, nor in their Nature.

Things enure diversly according to the Diversity of

20. *Time.*

Land given in Frank marriage reserving a Rent, the Reservation is void until the fourth Degree be past, and then it is good ^c.

21. *Person; and of the same Person.*

A Release made to the Husband and his Heirs goes in Extinguishment of a Rent-charge issuing out of the Land of his Wife ^d.

^t 12 H. 7. 25.

^u 7 H. 4. 36. b.

^w 11 Ed. 4. 1. Post. 8. b.

^x Plowd. 379.

^y Bro Licent. 25.

^z 19 H. 8. 10. Kelwey

44. b.

^a 12 H. 8. 10.

^b Dyer, 114. pl. 60.

Noy's Max. 5.

^c 26 Aff. pl. 66: Co. Litt. 21. b.

^d 14 H. 8. 6.

22. *And of other Persons.*

If one makes a Lease for Years of a Manor, except an Acre, this Acre is not Part of the Manor, as to the Lessor, but as to a Stranger, who hath right to demand the Manor by an elder Title, it remains parcell, and for this reason it shall not be excepted in the Writ^e.

Tenant in Tail, and his Issue, disseizes the Discontinuee of Tenant in Tail; Tenant in Tail dies, and the Land descends to his Issue; now the Issue is remitted, and shall be in as Tenant in Tail as to all Strangers, and shall deraign the Warranty Paramount, but not as to the Discontinuee, because he was a Partner of the Guilt^e.

*Next of Relatives.*23. *A Man may not do an Act to himself.*

A Man^e may not present himself to a Benefice, nor make himself an Officer, nor sue himself, which is the Reason that^b a Man who hath right to Land, and the Freehold is afterwards cast upon him by a latter Title, shall be remitted, that is, shall be said to be in by his elder Title, because that there is not any Person against whom he may have an Action, and he may not sue himself.

Also a Man may not summon himselfⁱ.

If a Sheriff suffer a common Recovery, this is Error, because he may not summon himself^k.

A Man may not be Judge and Party in his own Suit. And for this Cause if a Justice of the Common Bench be made a Justice of the King's Bench, altho' it be only hac vice, this shall determine his Patent for the Common Bench; for if he should be Judge of both Benches together, he should controul his own Judgments, for if the Common Bench err, it shall be reversed in the King's Bench^l.

Of Comparisons.[b] *First, Of such as be equal or alike.*

24. *Things shall be construed according to the Equality of Reason.*

^e Plowd. 104. ^f 11 Ed. 4. 2. ⁵ Ed. 4. 22. Co. Litt. 357. b. ^g 13 H. 8. 22. ^h Littlet. §. 659 ⁱ 8 H. 6. 29. ^k Dyer, 188. pl. 8. Co. Litt. 141. a. ^l P. 5. Mar. Bro. Commission 25.

Upon

Upon a Recognizance acknowledged by the Ancestor, or a Judgment against him in an Action of Debt, and he dies seized of two Acres, whereof one is held in Borough-English, or if he hath Issue two Daughters who make Partition, or if he die without Issue, by which Part of his Land descends to the Heirs on the part of the Father, and Part to the Heirs on the part of the Mother, in all these Cases if one only be charged, he shall have Contribution against the other, for they are in equal Law^m.

Where two, four, or more Men, being severally seized of Land, join in one Recognizance, all their Lands shall be equally extendedⁿ.

And this is a logical Virtue, a Kind of Equity as Bracton calls it, where he saith, ° *Æquitas est rerum convenientia quæ paribus in causis paria jura desiderat, et omnia bene coæquiparat; et dicitur æquitas quasi æqualitas.* The Nature of which is to amplify, enlarge, and add to the Letter of the Law.

This doth in a special manner shine forth and operate in the Exposition of Statutes, in extending Things which are there provided to Mischiefs in the same Degree, whereof Examples are pregnant enough, and in guiding the Grounds and Maxims of Things, which newly arise, according to the Rule of the Common Law.

At the Common Law Uses^p were nothing but a mere Shadow, but now these being reputed amongst Inheritances, they are demeaned as other Inheritances at the Common Law, so that a^q *possessio fratris* may be of a Use, and the Use of Land^r in Borough-English shall descend to the youngest Son.

But this does not extend to collateral Things, as Tenancy by the Curtesy, Dower, Descent to take away Entry, &c.

^m 3. Co. 12. b. 13. a. ⁿ 3. Co. 13. a. 2. Inst. 396. 2 Bulst. 15. ° Bracton, l. 1. c. 3. ^p Postea, 31. b. ^q 5 Ed. 4. 7. Co. Litt. 14. b. 4. Co. 22. a. Plowd. 58. Dy. 10. b. 11. a. pl. 40. Raym. 317. 1. Co. 121. b. ^r 2. And. 146. Co. Litt. 23. a. 2. Rol. Abr. 780. pl. 6.

As they differ in Degree of Comparison, being greater or less.

25. *Things of a higher Nature, determine those of a lower Nature.*

Where a Man hath Liberties, or Franchises by Prescription, and afterwards takes thereof a Grant of the King by Patent, this shall determine the Prescription, for Matter in Writing determines a Matter in Deed *.

If an Offence, which is Murder at the Common Law, be made High Treason, no Appeal lies thereof, because the lesser Offence, viz. the Murder, is drowned, and is punishable as High Treason, whereof no Appeal lies †.

26. *Majus continet minus.*

Where a Custom of a Manor is, that a Copyholder may demise in Fee, he may, by Virtue of the same, demise for any lesser Estate without other Prescription †.

And where a Custom is to demise for Life, he may demise to his Wife durante viduitate, for this is less than the Custom doth warrant †.

[7] By the Statute 32 H. 8. c. 1. which gives Power to devise two Parts of the Land, the devise of all his Land had been good for two Parts, altho' the Statute 34 and 35 H. 8. c. 5. of Explanations had not been made †.

27. *Majus dignum trahit ad se minus dignum.*

An Adulterer takes the Wife of another Man, and puts new Cloaths upon her, the Husband may take with the Wife the Cloaths which are upon her †.

A Box sealed with Charters in it, shall go to the Heir with the Charters, and not to the Executors. And a base Mine containing Gold, shall go to the King, in respect of the Dignity of the Gold †.

The Body of a Man is more worthy than the Land, and therefore the Land shall ensue the Nature of the Person †. As a Villain shall make free Land to be Villain Land, but the Villain Land shall not make a free Man to be a Villain. So the Land of the King, which he hath in his natural Capacity, shall be reputed according to the Privileges and Prerogatives of the Person of the King.

* 21 H. 7. 5. 33 H. 8. Bro. Prescrip. 102. † Dyer 50. pl. 4.
 † 4 Co. 23. a. † 4 Co. 30. a. † Dyer 150. pl. 89. † 11 H.
 31. † Plowd. 323. † Plowd. 238.

28. *Accessorium sequitur Principale.*

A Servant procures a Stranger to kill his Master, this is not Petit Treason in the Servant, because it is only Felony in the Principal ^b.

In an Annuity granted by a Parson cum nomine pænæ, the Successor shall be charged with the Penalty due in the Life of the Predecessor, and not the Executor ^c.

The Profits of the Officer of Filizer, &c. shall not be put in Execution upon a Recognizance, Statute, or the like, because that the Office itself, being an Office of Trust, shall not ^d.

29. *The Words of the Party himself are void, when the Law implies as much; or expressio eorum que tacite insunt nihil operatur* ^e.

Lands are given to two, and to one of them the Survivor, they make Partition and one of them dies, the other shall have back the part of him who died first, for to one of them the Survivor, are Words of no Effect, insomuch that without such Words a Jointenant is by the Law to have all if he survives ^f.

*Of the Rule of Method.**In Things of Formality.*30. *Generalia precedant, specialia sequuntur.*

In a Writ, the general shall be put in Demand, and in the Plaint, before the Special, as Land before Meadows, Pasture, Wood, Soil where Rushes do grow, Marsh, &c. Wood before Alders, Willows, &c. ^g.

31. *Magis dignum precedat.*

The whole Thing shall be demanded in a Præcipe, before the Moiety, Part, or Parts ^h.

The Thing of greater Dignity before the lesser, as an House before Land, a Castle before a Messuage, or Manor, Arable Land before Meadow, Pasture, Wood, or any other Soil ⁱ.

[b]

^b 40 Ass. pl. 25. 1 Hal. Hist. Pl. Cor. 378, 379. ^c 7 H. 6. 19. b. ^d Dyer 7. pl. 11. ^e Wing. Max. 235. ^f 30 Ass. pl. 8. Fitz. Part 16. Dy. 46. pl. 7. Bacon's Max. Reg. 21. Co Litt. 191. a. ^g Post. 53. b. Reg. Orig. 1. b. F. N. B. 2. c. 8. Ass. 24. In which Assize (Wood) was put before Pasture, yet good. ^h Reg. 1. b. F. N. B. 2. Post. 53. b. ⁱ F. N. B. 2. Plowd. 169. 4 Co 39. a.

THE FIRST BOOK

In a Replevin, if it be of two Chattles, the one quick, the other dead, the Chattle alive shall be first demanded^k.

Where one hath the Right of Presenting to a Church twice, and another a third time, if he who hath the third Turn be Plaintiff in a Quare Impedit, he shall not commence first with his own Turn, but with the other two Turns^l.

The next pursue the Rules of Natural Philosophy.

32. *Naturæ vis Maxima.*

Affection for the Provision of the Heirs Males which a Man shall beget, and Brotherly-Love, are good Considerations to raise an Use, but long Acquaintance or Familiarity is not^m.

A Man may infeoffe his Son and Heir, pending a Præcipe quod reddat against him, and is not within the danger of Articuli super chartas, cap. 11. which wil- leth, that none taketh upon him Business which is in Plea, for to have Part thereof, because a Son is bound to aid his Father, whensoever he canⁿ.

One Brother may maintain another Brother^o.

Brothers or Cousins shall not wage Battle in a Writ of Right^p.

A Statute, that all Persons who should receive, or should give Meat or Drink, or other Aid to one who should do such an Act, knowing thereof, should be an Accessary to the Offence, should not extend to a Wife that receives or gives Meat or Drink to her Husband^q.

The Law judges of all and esteems them according to their Nature, viz. Persons, and their Ages; Things, Ac- tions, and the Times when they are done.

Of P E R S O N S.

33. *The Law respects the Excellency of some, and gives to them singular Privileges and Pre-eminences above others.*

The Law tenders the Weakness and Imperfections of others, as of Men out of the Realm, and in Prison:

^k Regist. 81. b. 1 Dyer 299. b. ^m Plowd. 302, 303, 304, 305, 306. ⁿ 6 Ed. 3. 274. ^o 20 H. 6. 12. F. N. B. 172. h. ^p Plowd. 306. ^q Ibid. 465.

^l Inst. 564.

^o 32 H. 6. 2. b.

Infants and their Ages ; Ideots, Men of unsound Memory, or void of any Helps of Intelligence, as born Dumb, Deaf and Blind, or being under other Imperfections.

The dying seized of a Disseizor is not a Descent to take away an Entry, if the Disseizee was all the while within Age, Covert-Baron, in Prison, or out of the Realm.

Upon a Lease made to Baron and Feme, she after the Death of her Husband, shall not be charged for Waste done during the Coverture. [8]

A Feme shall be endowed of the best Possession of her Husband, as if her Husband held of J. S. by 3. d. and he over by 20. d. and J. S. release to the Husband, so that now he holdeth by 20. d. the Feme being endowed of this, shall hold the Land solely by the third Part of 3. d. and not by the third Part of 20. d.

An Ideot shall not plead by Guardian, or Prochein Amy, but shall appear in his proper Person in every Action brought against him, and he who pleads the better Plea for him shall be admitted.

If a dumb Man bring an Action, he shall plead by Prochein Amy.

34. *Strangers not Parties, or Privies.*

Lessee for Years grants a Rent Charge and surrenders, the Rent shall be paid during the Term. So if he in the Reversion grants a Rent to commence after the Term, and after the Lessee surrenders, the Rent shall be paid presently ; for a Stranger, as the Grantee of the Rent is, for his Benefit shall say, that the Term continues, and for his Benefit shall say, that it is determined.

And hereupon,

35. *Of Things done in the Right of another.*

A Man outlawed or excommunicated, is enabled to bring an Action as Executor. And a Villain, in

^r Littlel. §. 402, 403, 404, 407, 436, 439, 440. ^s 2 H. 4. 3. ^t 22 Ed. 3. Fitz. Dower 131. ^u 33 H. 6. 18. b. ^w 10 Ed. 3. 536. ^x Plowd. 198. ^y 21 H. 6. 30. b. ^z 21 Ed. 4. 49. b. 14 H. 6. 15. Co. Litt. 128. a. Post. 46. a. ² Co. Litt. 134. contra. Doc. Pla. 8. 10. 173. contra Godolph. Orp. Leg. 78. 155. contra

such a case, shall have an Action against his Lord^a, for these recover here to the use of another.

The Law disfavours others, as,

36. *Aliens not born within the Realm, nor made Denizens; so that they shall not be Partakers of the Privileges of Subjects born, especially alien Enemies.*

An Alien Enemy shall not have a personal Action, but other Aliens may^b.

If an Obligation be made to an Alien Enemy, the King shall have it^c.

Every Man may seize the Goods of an Alien Enemy to his own proper use^d.

As to the AGES of PERSONS.

37. *The Law esteems.*

21 Their full Age to make all their Acts good^e.

14 Their Age of Discretion^f. And also,

14 A competent Age to bind a Man in Matter of Marriage^g.

12 To bind a Woman^h.

9 To have her Dowerⁱ.

Of THINGS.

The Law respects every thing according to its Dignity, as,

[o] 38. *Life.*

39. *Liberty.*

40. *The Person above the Possessions.*

An Idiot, he who is Non Compos Mentis, or Lunatic, shall not avoid his own Feoffment, if it be done in Person, or by Attorney, because he may not stultify himself; but he shall not lose his Life for Felony or Murder^k.

A Villain infranchised for an Hour is infranchised for ever^l.

Menace of corporal Pain shall avoid a Deed; otherwise of Goods^m.

^a Litt. §. 191. ^b Dyer 2. pl. 8. ^c 19 Ed. 4. 6. ^d 7 Ed. 4. 14. ^e Co. Litt. 78. b. ^f Ibid. ^g 35 H. 6. 41. b. ^h Co. Litt. 78. b. ⁱ Ibid. 7 H. 6. 11. b. ^k 4 Co. 123. b. Co. Litt. 247. a. ^l Dyer 60. pl. 23. ^m 7 Ed. 4. 21. Bacon's Max. Reg. 6. & 18.

41. *Matter in Right more than Matter in Possession:*

A Person shall not have Aid in Avowry or Annuity, if the Plaintiff was seized by the Hands of the same Person, for this is of his own Wrong. Otherwise it is in a Cessavit, for this is in the right, for the Land^a.

In an Action of Trespass against Tenant for Life, who pleads Villainage in the Plaintiff, and the Plaintiff is found Free and not a Villain, yet he in the Reversion shall not be Estopped by this Verdict; for the Thing itself whereupon the Reversion depends, is not in demand, and the Plaintiff only shall recover Damages, not he in Reversion, nor may he have Error or Attaint hereupon. Otherwise in a *Nativo habendo*, for there the Right of the Villainage comes in Debate, and he in the Reversion shall have Error or Attaint^o.

42. *Yet Possession is favoured when the Right is equal.*

Where a Man purchases several Lands holden of several Lords by Knight's Service, and the Purchase is made at one time, and he dies, the Lord who first seizeth the Heir, shall have the Wardship of him^p.

Baron and Feme purchase to them and the Heirs of their Bodies Lands holden in Soccage, and die having Issue under fourteen Years; now if the Grandfather of the Part of the Mother of the Issue first seizes the Body, he shall have the Wardship, and not the Grandfather of the Part of the Father of the Issue^q.

43. *Matter of Profit or Interest largely; but Matters of Pleasure, Ease, Trust, or Authority strictly.*

A License to hunt in my Park, or to walk in my Garden, extends only to the Person himself, not to his Servants or others in his Company, for it is but a Matter of Pleasure; otherwise it is of a License to hunt, kill, and carry the Deer, for this is a Matter of Profit^r.

A Way granted to go to a Church over my Land, does not extend to any other, but only to the Person himself, for it is but a Matter of Case^s.

^a 3 Ed. 3. 88. b. ^o 14 H. 7. 5. Keb'e. ^p F. N. B. 142. f.
² Inst. 393. Fleta lib. 1. cap. 13. pl. 12. ^q Plowd. Carril's
Case 295, 6, 7. Co. Litt. 88. a. ^r 13 H. 7. 13. ^s 12 H. 7.
25. b.

An Office of Skill and Diligence shall not be granted over, except it be granted to him and his Assigns, or in Fee¹.

It is Felony in the Sheriff to kill one, who ought to be hanged^u.

The King licenses one to alien the third Part of his Land, and he aliens all, the Alienation is wholly void^v.

44. *And therefore those of the latter sort may be countermanded, so may not the former.*

[9] A License^x to come into my House to speak with me, or a Letter of Attorney, may be countermanded. So of Goods delivered^y over to deliver to J. S. or to dispose^z in Alms. Otherwise it is of a Thing delivered in Consideration or Satisfaction of another Thing, as if the Deliverer had been bound to pay such a Sum; or if he saith, that where J. S. hath infeoffed him of such Land, in Consideration thereof he giveth him Money^a.

45. *Matter of Substance, more than Matter of Circumstance.*

Pleas in Ban and Replications (altho' the Plaintiff be Non Suit) make an Estoppel, for they are expresse Allegations and Material; as in Debt upon an Obligation, if the Defendant pleads in Bar an Acquittance made to D. or if the Defendant pleads an Acquittance, and the Plaintiff replies, that it was made by Duress of Imprisonment to D. Now in another Action, the Defendant shall not plead that the Acquittance, nor the Plaintiff that the Duress was at another Place: But Matter in the Writ or Count, does not make an Estoppel, for they are but as Supposals, as in a Formedon, and claim by Descent from J. S. or in a Mort d'Ancestor, as Son and Heir to J. S. yet in another Formedon, he may claim by J. D. and shall not be estopped^b.

Also Recitals do not make an Estoppel, for they are not material. As where A. reciting that he is seized in Fee of the Manor of D. grants a Rent out of it to B.

¹ 11 Ed. 4. 1. ^u 35 H. 6. 58. Dr. & Stud. 1. 2. c. 41.
^v Plowd. 68. b. ^x 9 Ed. 4. 4. b. ^y 14 Ed. 4. 2. b. ^z 1 Ed.
^a 5. 2. ^b Dyer 22. a. ^c Dyer 49. a. b. ^d 21 H. 7. 24. b.

yet A. is not estopped to say, that he hath nothing in the Manor ^c.

46. *Things executed more than executory.*

A. disseizes B. to the use of C, B. releases to A, C. agrees to the Disseizin, yet the Release is good, inasmuch as it was executed ^d.

A Feoffment to the use of his Will, and the Will is declared before, or at the Time of the Feoffment, this may not be altered, for that it is executed; otherwise it is of his Will declared afterwards ^e.

47. *Possibility of Things.*

And hereupon,

That nothing be void, which by Possibility may be good.

Land given to a Man, and a Woman married to another Man, and to the Heirs of their two Bodies, is a present Tail executed, for the Possibility that they may inter-marry ^f.

A Gift in Tail of the Mesnalty, reserving Rent is good, for the Tenancy may Escheat to the Donee, and then he shall distrain for all Arrearages ^g.

Where a Woman is *priviment ensient*, she may detain the Charters of the Daughter, the Heir of her Husband, in respect of the Possibility, that a Son may be born ^h.

48. *Where there is Quid pro quo.*

A Man is not bound by his Assumption or Promise, except it be upon good Consideration of another Thing ⁱ.

A Use may not be raised without good Consideration; and this Consideration ought to be some Cause or Occasion meritorious, which amounts to a mutual Recompence in Deed or in Law ^k. [b]

A Writ of Annuity shall be maintainable against a Parson upon an Ordinance made by the Ordinary, without the Patron, if he have Quid pro quo ^l.

^c 33 H. 6. 10. b. ^d 14 H. 8. 18. b. ^e 20 H. 7. 11.
^f 15 H. 7. 10. Fitz. Tail 32. Bro. Tail 16. Estates 22. Powd.
 35. Co. Litt. 20. b. 25. b. ^g 1 H. 4. 1. ^h 41 Ed. 3. 11. b.
ⁱ 17 Ed. 4. 4. b. ^k 21 H. 7. 13. b. Dyer 336. pl. 34. ^l F.
 N. B. 152 g.

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In ACTIONS.

The Law gives Favour, when in the doing of a Thing there is

49. *Necessity.*

Funeral Expences shall be first discharged by Executors, and this is for Necessity^m.

For Damage- Feasant a Man may distrain in the Night in respect of the Necessity, for otherwise, perhaps, he may not distrain at all, for before the Day, the Cattle may be taken or estrayed out of the Landⁿ.

A Man in his own Defence for Necessity to save his Life, and a Champion in a Writ of Right for the Necessity of Trial may kill another^o.

Whereto is to be referred.

50. *Conformity, which is a kind of Necessity.*

Where an Infant in Ward marries himself, yet to have the Forfeiture of the Marriage, the Lord ought to tender to him Marriage after^p.

Against a Plea in Avoidance of a Fine, that the Parties to the Fine had nothing, it ought to be shewn who hath; but this is not traversable, being only shewn for Conformity^q.

51. *Colour.*

If the Heir assign Dower to a Woman his Ancestor, when she was not dowable, she shall thereby hold in Dower^r.

Where a Court hath no colour to hold Plea, as a Court Baron of Land not holden of the Manor, the whole is void, and Execution there shall be avoided by Trespass, or Assize, as the Case is: But where there is a Colour, as if a Court Baron hold Plea of Land holden of the Manor, although it be by Plaint, where it ought to be by Writ Original, yet the Judgment is only voidable by Writ of Error^s.

Feme grants the Reversion, and marries with the

^m Dr. & Stud. l. 2. c. 10. 1 Rol Ab. 926. pl. 1. ⁿ 11 H 7.
^o Dr. & Stud. l. 2. c. 9. Co. Litt. 142. a. ^p Plowd. 19.
^q Bro. Forfeiture of Marriage, 12. ^r 40 Ed. 3. 30. b. ^s 41 Ed.
 3. 28. b. ^t 22 Aff pl. 64.

Grantee,

Grantee, there if the Tenant pay the Rent to the Grantee generally, this is no Attonement, inasmuch as he hath Colour to pay the same to him, as a Man seized in Right of his Wife^t.

52. *The Law esteems the Acts of the Law, more than the Acts of the Party.*

Upon a Grant of Rent, the Tenant shall not attorn, nor put the Grantee in Possession by an Ox, or the like, because that it is another kind of Thing; but upon a Recovery of the Rent the Sheriff may^u.

Parceners may compel Partition, so may not Jointenants or Tenants in common^w.

A^x Rent granted for owelty of Partition between Coparceners, shall be Fee-Simple without the Word (Heirs) and shall^y issue out of the Land, without expressing the same in the Grant. Also^a a Rent, Reversion, Seignior, ^b Way, ^c Advowson, or the like, shall [10] be good to this purpose without Deed: But otherwise it is in Grant.

Parcenors shall have a Quare Impedit, the one against the other, viz. the eldest Sister shall have it where she is disturbed in her Presentment, otherwise it is of Jointenants, or Tenants in common^d.

The Law judges that every one will do that which is most for his Advantage. And for this Reason.

53. *Credit is given to the Party touching those Things which are done by him to his own Disadvantage.*

At the Common Law, if Tenant in Præcipe quod reddat plead Jointenancy with a Stranger, or that he is a Villain to J. S. and holds in Villainage, the Writ shall abate, and the Demandant shall have no more Answer to it, although that it be false, because by the Plea he hath bound himself and his Blood in perpetual Bondage, which the Law presumes he would not do, if the same were not true^e.

^t 2 R. 2. Fitz. Attornment, 8. ^u 49 Ed. 3. 15. ^w Littlel. §. 247. Dyer 29. a. ^x Littlel. §. 290. ^y Plowd. 134. ^a 2 H. 7. 5. Co. Litt. 10. a. ^b 29 Aff. pl. 23. ^c 2 H. 7. 5. ^d 21 Ed. 3. 7. ^e 11 H. 4. 3. Post. 96. b. ^f Dyer 29. pl. 194. F. N. B. 34. u. ^g Manxel's Case. Plowd. 6.

So in Replevin, if the Lord avow, and the Tenant disclaims, the Lord shall be condemned without Answer, for the Disclaimer gives to the Lord a better Benefit, viz. the Right of the Land itself^f.

As to the TIME of doing Things.

The Law countenances more.

54. *Things done in Time of Peace, than in Time of War.*

Disseizin and Descent in Time of War, is no Descent to take away an Entry^g.

Usurpation in Time of War, shall not put the rightful Patron out of Possession, but he shall have (notwithstanding the same) Assize of Darrein Presentment, if his Ancestor had last presented^h.

55. *Things done in the Day, more than in the Night.*

Upon a Rent payable at a certain Day, he hath the whole Day until the Night to pay it; but if it be a great Sum of Money, as £500 or £1000, there he ought to pay it so long before the going down of the Sun, that the Money may be numbered; for otherwise, he is not bound to number it in the Nightⁱ.

A Man may not distrain in the Night, for Rent in Arrear^{*}.

Where it is convenient that Things should be restrained to a certain Time, the Law esteems (according to the Nature of the Things.)

56. *Sometimes a Year and a Day sufficient.*

The Lord shall lose his Villain for ever, if he flies into ancient Demesne, and continues there a Year and a Day without Claim of the Lord^k.

Recovery in a Writ of Right, and Fines executed, shall bind all Persons, although they have Right, if they make not their Claim within a Year^l.

^f 13 H. 7. 27. b. ^g Littlet. §. 412. ^h 7 Ed. 3. Fitz. Darr. Present. 2. F. N. B. 31. Co. Litt. 249. b. ⁱ Plowd. 172. Co. Litt. 202. But the Rent is not due till the last Minute of the natural Day, (Midnight) for if the Lessor dies after Sun set and before Midnight, the Rent shall go to the Heir, and not to the Executor. 1 Sand. 287. Salk. 578 1 Peere Wm. 177. ^{*} 11 H. 7. 5. ^k Plowd. 372. ^l 5 Ed. 3. 222.

The King may not grant a Protection to continue above a Year ^m.

57. *Sometimes a Day.*

Where Goods are lost in War, and retaken of an Enemy of the King, by another Subject of the King, the Owner shall have them again, if he makes fresh Suit before the setting of the Sun ⁿ.

[b]

58. *The third Offence is esteemed in the Law most Heinous.*

The third Writ not returned by the Sheriff, is a Contempt, upon which an Attachment lies ^o.

Next follow POLITICAL RULES.

The Law favours.

59. *Things for the Defence of the Realm.*

Where a Man holds by Knight's Service, which is an entire Service to be done by the Body of a Man, although the Lord purchase Parcel of the Tenancy, yet the Service remains, because it is for the Defence of the Realm ^p.

In Time of War, a Man may ^q justify making Bulwarks in another's Soil without License.

60. *Things for the good of the Common-Wealth.*

Those who are Fishers in the Sea, may justify going upon the Land adjoining to the Sea to dry their Nets, for such Fishery is for the Public-good, and for the Sustenance of all the Realm, wherefore this is the Common Law ^r.

A Millstone, which is taken up to be picked and cleaned, may not be distrained, for this remains a Parcel of the Mill, which is a Thing useful to the Public ^s.

Things in an Inn, or which are brought into a Fair or Market to be sold, or my Garment which lies in a Taylor's Shop, or a Horse which is with a Smith to be shod, may not be distrained ^t.

^m 39 H. 6. 39. b. Co. Litt. 254. b. Post. 65. b. ⁿ 7 Ed. 4. 14. Vavafor. ^o 2 Ed. 4. 1. ^p 6 Co. 2. a. ^q 8 Co. 105. a. Co. Litt. 149. a. ^r 1 Dyer 36. pl. 40. ^s 8 Ed. 4. 18. b. ^t 14 H. 8. 25. Post. 32. a. ^u 22 Ed. 4. 49. b. ^v 22 Ed. 4. 36. Bro. Distr. 71. Co. Litt. 47. b.

61. *Public Repose.*

Whereupon

Communis Error facit jus.

An Acquittance by a Mayor in his own Name only, where the Town is incorporated by the Name of Mayor, Sheriff, and Burgeſſes, is good; that is, where there are a hundred Precedents and more of ſuch Acquittances, and this is for the common Repoſe of the Kingdom^u.

Whether a common Recovery be a Bar to an Eſtate-Tail or not, is not to be diſputed, for that a great Part of the Inheritances of the Realm depend upon them^w.

Common Recoveries are favoured, becauſe they are common Affurances^{*}.

62. *Things which are in Cuſtody of the Law.*

Tenant for Life, the Remainder to the right Heirs of J. S. Tenant for Life is diſſeized, and a Deſcent caſt, and afterwards J. S. dies, and afterwards Leſſee for Life dies, the Entry of the right Heir of J. S. is congeable, for this is committed to the Cuſtody of the Law, which the Law will preſerve lawfully, and without any Violence or Deſtruction^y.

[11] Where Beaſts are impounded in the ſame Land for Damage-Feaſant, the Lord of the Land may not diſtrain them for the Rent, for they are in Cuſtody of Law^z.

Goods taken for Diſtreſs, ſhall not be put in Execution for the Debt of the Owner of them^{*}.

Such are theſe ŒCONOMIC S.

63. *Husband and Wife are one Perſon. And therefore,*

The Wife is of the ſame Condition with her Husband.

^a Free if he be free: ^b Denizen if her Husband be an Engliſhman, altho' ſhe was a Nief before or an Alien born.

^u 2 R. 3. 7. ^w Manxel's Caſe. Plowd. 2. Dr. & Stud. 1. 1. c. 26. ^x 2 Co. 74. a. 3 Co. 3. b. 6. a. ^y 1 Co. 134. b. ^z Bro. Diſtreſs, 75. ^{*} B. q. Pledges, 28. ^a F. N. B. 78. g. ^b Bro. Denizen, 21.

They

They may not see one another, nor make any Grant to one another, &c.

If a Woman Obligee marry with her Obligor, the Debt is extinct, and she shall never have an Action against a Co-obligor (if another was bound with him) because the Suit against her Husband was suspended by the Inter-marriage; and this being a personal Action, and suspended against one, is discharged as to all. The same Law if a Feme Sole deliver Goods to one, and after marries with the Bailee ^c.

Obligation upon Condition to infeoffe a Woman before such a Day, and before the Day the Obligor takes her to Wife, now the Obligation is gone; for it is now become impossible by his own Act. But a Man may make a Lease for Years, with a Remainder to his Wife ^d.

Upon a Joint-Purchase during the Coverture, each taketh the whole.

Upon a ^e Joint-Purchase during the Coverture, and the Baron Alien, the Feme shall have a Cui in Vita of the whole; and the Warranty of one of them; or his Ancestors is a Bar of the whole against both; and upon a Feoffment to Baron and Feme, and a third Person, the third Person takes one Moiety, and the Baron and Feme the other Moiety ^f.

The Husband is the Head of the Wife; and therefore

All that she hath, belongs to her Husband.

That is to say, ^gPersonal Things absolutely; but Things Real, as Lands, Rents, &c. or Chattles Real and Choses in Action, only in her Right; but yet Things Real and Choses in Action, he may dispose of at his Pleasure, and he shall have the Chattles Real, if he survive; and the Choses in Action, the Feme herself may dispose of by her last Will.

If Tenant in Tail infeoffe a Woman and die, and the Issue in Tail within Age takes her to Wife, he shall be remitted, and the Feme hath nothing, for he may not sue a Formedon in this Case, except that he will sue it

^c 21 H. 7. 29. b. ^d 4 H. 7. 3. b. ^e 39 H. 6. 45. b. ^f Litt. §. 291. ^g Dr. & Stud. 1. 1. c. 7. Plowd. 418, 294. Co. Litt. 46. b. 300. a. 351. a. Wood's Com. L. 64. Hob. 3. 12 H. 7. 24. b. against

against himself, because by the Inter-marriage he is seized in Right of his Wife^g.

- [b] If Lessee for Years^h grant his Term to a Feme Covert and to another, or if a Feme Sole and another be Jointenants for Years, and she take a Husband, yet the Estate of the Feme and the Jointure continues, so that the Survivor of the Feme, or of the other, shall have the whole, and if a Stranger oust her, she and her Husband ought to join in an *Ejectione Firme*, and the Feme shall have Judgment as well as the Husband, and the Husband in Pleading shall say, that they are seized in Right of the Wife. And in such Case, viz. where the Feme hath a Lease for Years,ⁱ the Husband may not devise this by Will (for the Wife hath an Estate in it before and at the Time of his Death, which prevents the Devisee) nor shall he^k grant a Rent Charge out of it, for the Wife, if she survive, is remitted to the Term, and therefore shall avoid the Charge; but the Husband, by an express Act, may grant this in his Life-time; but if a Feme^l having Chattles Personal, take Husband, the Law divests them out of the Wife, and vests them in the Husband only; and upon Goods given to a Feme-Covert and another, the Jointure is severed, and the Husband and the other are^m Tenants in Common. Also the Executor of the Husband, shall have all the Goods which belonged to the Wifeⁿ, but in an Action of Debt for Arrearages of Account (where one was Receiver to a Feme when she was Sole) both of them, viz. the Husband and Wife ought to join, although the Auditors were assigned during the Coverture, for the Cause of the Action, viz. the Receipt, to which the Assignment of Auditors was but a Thing of Consequence, was in her Right; yet the Release^o of the Husband of an Obligation made to the Feme, or of a Trespass of Goods which were taken from her, when she was Sole, shall be good against the Wife, if the Husband die, but if he die without making such

^g Littlel. §. 665. ^h Plowd. 418. Co. Litt. 185. b. ⁱ Plowd. 191. Co. Litt. 351. a. ^j Godolph. Leg. 31. ^k Co. Litt. 184. b. 351. a. ^l Co. Litt. 351. b. ^m Godolph. Orph. Legacy, fo. 30. ⁿ 21 H. 7. 29. b. ^o 16 Ed. 4. 8. ^p 7 H. 6. 1. b.

Release, the Feme shall have an Action upon the Obligator, and not the Executors of the Husband.

So a Feme, who survives, or the Exetutor of the Wife, if she dies in the Life of her Husband^p, shall have Choses in Action, and not the Husband; or she may make the Husband her Executor, and then he shall recover them to the use of the last Will of the Wife^q.

But a Lease for Years which the Wife hath, shall go to the Husband, if he survives, for this is a Chose in Possession, and not in Action^r.

The Will of the Wife is subject to the Will of her Husband.

Upon a^s Feoffment to a Feme-Covert, she shall not take any thing except her Husband will agree; and upon an Obligation to infeoff Baron and Feme, the Refusal of the Husband, is the Refusal of both; but where Baron and Feme are Joint-Purchasers, the Husband may make Livery, altho' the Wife be upon the Land, and will not agree, and this shall be a Discontinuance. If he^t bargain and sell the Land of the Wife by Indenture, and the Vendee grant to them for the same Consideration an annual Rent, Acceptance of this Rent by the Feme, after the Death of her Husband, shall not bar as to the Land, altho' the Acceptance is an Agreement to the Bargain, but the Bargain being but a Contract, is the Bargain of the Husband only, and not of the Wife. An^u Obligation, or the like, by a Feme-Covert, is meerly void. Upon^v Delivery of Goods by Baron and Feme, they shall not join in Detinue, for it is the sole Delivery of the Husband, and void as to the Wife.

In Account upon Receipt by the Hands of the Wife [12] of the Plaintiff, the Defendant may wage his Law^x.

Upon this Ground it is, y that a Wife shall never Answer in any Action, without her Husband. And if

^p 39 H. 6. 17. b. Co. Litt. 351. a. ^q Godolph. Leg. fo. 30. & fo. 31. ^r Plowd. 191. Hob. 3. Co. Litt. 185. b. ^s 1 H. 7. 16. 15 Ed. 4. 5. b. 21 Aff. pl. 25 ^t 26 H. 8. 2. ^u 1 H. 5. 12. b. 1 H. 7. 15. b. ^v 8 Ed. 4. 15. b. ^x 10 Ed. 4. 5. b. Bro. Ley. 92. Co. Litt. 295. a. ^y 34 H. 6. 29. b. 40 Ed. 3. 34. b. 41 Ed. 3. 22.

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in Trespafs against them the Wife come in by Cepi Corpus; and the Husband does not appear, she shall be without Mainprize until her Husband come in; but the Husband; when he appears, may answer without his Wife: And therefore a Protection cast for the Husband serves for the Wife also, because she may not answer without him^a.

And therefore

The Law tenders Femmes Covert.

It is not Felony in the Wife, if she doth it by Coercion of her Husband^a.

In the Last Place come MORAL RULES.

The Law favours,

64. *Works of Charity.*

If one holdeth Land for to marry a poor Virgin yearly, and the Lord purchase Parcell of the Land, yet the Service remains, because it is Opus Chatitatis^b.

65. *Right.*

When two are in a House or other Tenements, and the one claims by one Title, and the other by another Title, the Law shall adjudge him in Possession, who hath right to have the Possession of the same Tenements^c.

66. *Justice.*

Statutes to suppress Wrong, or to take away Fraud, bind the King altho' he is not named. For Justice and Truth are the Supporters of his Diadem^d.

The King may not determine the Office of Sheriff or any Part, without constituting a new Sheriff, viz. for the Execution and Administration of Justice^e.

And therefore,

67. *It will countenance a Thing contrary to the Principles of the Law sooner than a Man should go without Remedy.*

Upon Process to avoid an Outlawry, a Man may not plead Non-hability in another Outlawry^f.

^a 2 R. 3. 15. ^b 35 H. 6. 3. ^c 27 Ass. pl. 40. ^d 24 H. 8. Bro Tenures, 53. ^e 6 Co. 2. a. ^f Littlet. §. 701. Plowd. 233. Hob. 322. ^g 5 Co. 14. b. ^h 11 Co. 72. a. ⁱ 4 Co. 33. a. ^j 7 H. 4. 40.

If the Lord distrain wrongfully, and the Beasts come back to the Tenant, he shall have Replevin because that he may not have a Writ of Trespass against the Lord^a.

A Man, after Judgment against him for the King, shall plead a Charter of Pardon, or the like, made between the Verdict and the Judgment; for there he may not have an audita Querela. But otherwise it is against a common Person^b.

68. *The Law abhors Wrong.*

If an^a Alienation be in Mortmain, or a Fine^b levied of the Reversion of Land held in capite without License, the Tenant is not compellable to attorn.

The King shall not do wrong by reason of his Prerogative^c.

So that,

None shall take Benefit of his own Wrong.

If a Man be bound to appear before the Justices at such a Day, now if he be imprisoned by the Obligee so that he may not come at the Day, the Obligation is saved, but if he be in Prison for Felony or other Misdemeanour, it is otherwise, for this is his own Default^d. [b]

Where an Infant is Plaintiff in Appeal, the Paroll shall not demur until his full age, for the Defendant shall not have advantage of his own Wrong^e.

If a Man in Execution escape, and the Goaler retaketh him, he shall continue in Execution for the Party again, if the Party will, for the Escape is of his own Wrong^f.

A Partner in Guilt shall take no Advantage of the Act of another.

A Disseizor infeoffes his Father in Fee, who dies seized, yet the Disseizor may enter, notwithstanding the Descent, for he shall be adjudged, as to the Disseizor, but as a Disseizor because he is particeps criminis^g.

And therefore,

69. *The Law of itself doth prejudice no Man.*

^a 1 H. 6. 7. 33 Ed. 3. Fitz. Replevin, 44. F. N. B. 69. h.
^b 11 H. 7. 10. ^a 17 Ed. 3. 7. ^b 45 Ed. 3. 6. ^c 13 Ed. 4. 8.
^d 31 H. 6. Fitz. Barre. 60. Noy's Max. 12. ^e 27. H. 8. 11. Bro.
 Paroll Demur. 1. Stamf. P. C. 62. ^f 13 H. 7. 1. ^g 5. Little. 395.
 D Upon

Upon a Feoffment made to two, one shall not deraign the Warranty without the other; yet if a Villain and another purchase Land, and the Lord enter into the one Moiety, the other may deraign the Warranty alone for his Moiety, for this is severed by Act of the Law^b.

He who abuses the Authority which the Law gives him, as if he comes into a Tavern, * and will not depart in reasonable Time, or if he distrains for Rent, and * sell the Distress, shall be a Trespassor from the Beginning. Otherwise it is if he abuse the Authority which he hath from me, as if I hire my Horse to one to ride to London, and he rides to another Place, yet his riding to London is lawful, and a general Action of Trespass does not lie against him, but an Action upon the Case.

70. *Especially in such Things wherein no Folly may be imputed to him.*

In a *Præcipe quod reddat*, if the Tenant make Default after Default, and the Judges will advise of their Judgment, and afterwards the Paroll is put without Day for the Demise of the King, in a Resummons the Plaintiff shall take advantage of this Default^b.

A Man shall have *ejectione firmæ* of a Rent before Seizin, for Seizin in Law shall be thereof adjudged in him, inasmuch as he may not have it before the Rent-day; otherwise it is of Land^c.

And therefore,

71. *The Law does not compell a Man to shew that which by Intendment he does not know.*

Count that he was elected Knight of the Shire to Parliament by the greater Number, is good, without shewing the certain Number, for the Election may be by Suffrages, or Hands, or the like, which may not easily be discerned^d.

[13] Obligation to serve J. S. in all his lawful Commands, it is a good Plea to say, that he served him lawfully, without shewing what Service, or in what Commands, for no Servant may remember all such Commands^e.

^b 48 Ed. 3. 17. * 12 Ed. 4. 8. * Vide Statute 2. W. & M. cap. 5. ^b 1 H. 7. 11. b. ^c 23 H. 8. Bro. Quare ejecit infra Terminum, 5. ^d Plowd. 126, 128. ^e 10 Ed. 4. 15. Plowd. 128, 129. Noy's Max. 13.

Covin may be averred generally without shewing in what manner it was; for Covin is a secret Thing contrived privily between two or three to the Prejudice of another^f.

72. *Truth.* (vide supra placito 66.)

And therefore

The Law disfavours

73. *Impossibilities.*

Count that a great Part of the Water of a certain River for Time thereof, &c. hath run from such a Place to his Mill, is good enough, altho' it be in a Count which requires Certainty; for it is not possible to shew what Quantity of Water runs to Mills^g.

If a Deed be surrendered in Court by which it remains there, this Deed may be pleaded in another Court without shewing it^h.

74. *Falshood.*

Upon a Reversion granted to two Men, or of two Acres, or for forty Years, or for Life with Remainder over, and Tenant attorns to one, or for one Acre, or for Part of the Years, or to the Grantee for Life only, this Attornment is good for all; but if the Tenant hath no notice of the true Grant, there such Attornment is void for the whole, because the Law abhors Falshoodⁱ.

If a Man bring an Action of Debt for two Payments at two Days, whereof the one is not come by the shewing of the Plaintiff himself, he by the same hath abated all his Writ^k.

75. *Fraud and Covin.*

If a Feme who hath a good Title of Dower cause J. S. to disseize the Ter-tenant, and upon this she recovers Dower against him, yet she shall not be Tenant in Dower, for she is privy to an unlawful Act which should be the Means of her Estate^l.

76. *Incertainties, whereby Truth is led astray.*

A Grant of all his Trees and Woods upon Black-acre which may reasonably be spared, is a void Grant, ^m if it be

^f Plowd. 46, 54, 55. ^g 4 Co. 89. a. Doctr. pla. 86. ^h 7 H. 4. 8. ⁱ 2 Co. 67. b. Co. Litt. 310. a. Post. 16. b. ^k 9 H. 7. 3. Fineux. 6 Ed. 4. 7. pl. 15. Plowd. 84. Kelwey, 31. b. ^l 18 H. 8. 5. 25 Aff. pl. 1. 44 Aff. 29. 44 Ed. 3. 46. 27 Aff. 74. Co. Litt. 35. a. 357. b. ^m Dyer 91. a. Hob. 174. Noy's Max. 12.

not referred to a third Person how much may be spared.

Upon two several Writs of one same Thing against the same Person, returnable at one same day, both shall abateⁿ.

[b] 77. *Variance.*

If the Writ vary from the Obligation or other specialty, in Name, Surname, or the like, ^o in Action of Debt or Annuity brought upon it, or if the Count ^a vary from the Writ, as in Debt for L. 20, and declare only for L. 10, both shall abate.

Essoign^b or Protection^c which varies from the original Writ upon which it is cast, in the Quantity of the Tenancy, or Name of the Party, shall be quashed, and where the ^d Servant of the Chancellor brings a Writ of Privilege, which varies from the original writ, (as if the Original be a Writ of Trespass, and the Privilege is in a Plea of Debt, or if the Original be an Action of Debt for L. 44, and the Writ of Privilege in a Plea of Debt of L. 42) his Privilege shall not be allowed.

78. *Contrariety.*

An Obligation is made *solvendum nunquam*, this *Solvendum* is void, and the Obligation is due presently^e.

A is bound in an Obligation to B, *solvendum eidem*. A. This is a good Obligation, and the *Solvendum* void, for the Plaintiff may declare upon a *Solvendum* to himself^f.

In Trespass for breaking his House, and breaking the Walls of the same House, the Defendant may not plead as to the breaking of the House Not Guilty, and justify breaking of the Walls, for the House and the Walls are a'l one, and he may not in one same Thing justify, and also plead Not Guilty; for by the Justification he acknowledges himself guilty; so the one is contrary to the other^g.

A Feoffment in Fee is made of two Acres to two Men, *habendum* the one Acre to the one, and the other to the other, this is avoid *Habendum*,^h for the Premisses

ⁿ Manxel's Case. Plowd. 10. ^o 11 Ed. 4. 2. ^a 8 Ed. 4. 2. b.
^b 4 Aff. pl. 2. ^c 7 H. 6. 22. ^d 32 H. 6. 3. ^e 21 Ed. 3. 46.
^f 4. Ed. 4. 29. ^g 21 H. 7. 21. b. ^h Plowd. 153. Hob. 172. Noy's
 Max. 13.

give to him an Interest in both Acres, and the *Habendum* excludes him to have any thing to do in one.

A Lease of a Manor except the Services, the Exception is void, for it is parcell of the Thing demised¹.

79. *Therefore the Law doth not put a Man to justify that which he endeavours to disprove.*

In Affize of the Mastership of a Chappell against J. S. he shall not name him *Master*, for the Plaintiff is to disprove his Interest^k.

Diligence. And therefore

The Law abhorrs

80. *Folly.*

Action of Waste lay not at the Common Law against Lessee for Life or Years, for that it was the Folly of the Lessor to make such a Lease, and not to restrain his Lessee by Covenant, Condition, or otherwise, that he should not do Waste^l.

If Baron and Feme as in Right of the Wife have [14] Title and Right to enter into Tenements which another hath in Fee, or in Fee-tail, and such Tenant die seized, there after the Death of the Husband the Wife may enter upon the Issue who is in by Descent, because the Descent is fallen during the Coverture; but where such Title is given to a Feme sole, who afterwards takes Husband, who did not enter at all, but suffered a Descent, &c. there it is otherwise; for it shall be said the Folly of the Wife to take such a Husband who did not enter in time^m.

81. *And Latches.*

Recovery in a Writ of Right barrs all, altho' they have Right, who do not put in their Claim within the Year and Day, For, *Vigilantibus non dormientibus jura subveniunt*ⁿ.

Speed. And for this Cause it abhorrs,

82. *Delays.*

He who pleads Matter of Record in Delay (as to prove the Plaintiff to be excommunicated)^o shall have

¹ Dyer, 97. a. ^k 10 H. 7. 9. ^l Dr. & Stud. 1. 2. c. 1. Co. Litt. 53, 54. ² Inst. 145. ⁴ Co. 62. b. ⁵ Co. 13. b. ⁶ Co. 43. a. ^m Littlet. 403, 404. ⁿ 5 Ed. 3. 222. Herle. ^o Plowd. 15. b.

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the Record ready in his Hands to shew; otherwise it is if he pleads it in Barr.

In dilatory Pleas both Defendants ought to join^p.

A Plea in Barr, which goes in Delay, shall be good to every common Intent^q.

83. *Unnecessary Circumstances.*

One who is in Court ready to join with the Defendant, may do this without Process, as Vouchee, the Lessor of the Plaintiff being prayed in Aid when the Defendant in Replevin avows upon him, or the Mesne, when the Lord Paramount avows upon him. But Joinder in Aid may not be by Attorney without Process^r.

Covenant with Lessee to make a new Lease upon Surrender of that Lease, and afterwards the Covenantor makes a Lease by Fine for more Years to a Stranger: This Covenant is broken altho^s the Lessee doth not surrender (which by the Words ought to be the first Act) for this should be in vain, inasmuch as the other hath disabled himself to take the Surrender, or to make a new Lease^s.

Demandant may wave Issue upon Counterplea of Voucher, and grant the Voucher; for if Inquest do pass, the Tenant may not have more^t.

84. *Circuity of Action.*

When the Father infeoffs his Son and Heir with Warranty and dies, the Son in a *Præcipe* against him may vouch the Feoffor of his Father, for the Law will not let him vouch himself, and when he cometh in as Vouchee, then to deraign the Warranty paramount for the Circuity of Voucher^u.

He who hath a Rent issuing out of Land disseizes the Ter-tenant, in Affize by the Disseizee, the Disseizor shall recover the Rent in the Damages. And the Reason is, to avoid Circuity of Action, for otherwise when the Disseizee reenters the Damages shall be revived^w.

^p 12 H. 7. 3. ^q 8 H. 7. 9. ^r 2 H. 6. 1. b. ^s Noy's Max. 13. Sir Anth. Main's Case 5. Co. 20. b. ^t 4 Ed. 3. 170. ^u Manxel's Case. Plowd. 7. ^w Dyer 2. pl. 7. 5 Co. 31. a. 24 Ed. 3. 50. 4 H. 7. 14. b. Fitz. Damages, 18.

Upon a Grant of a Ward with Warranty, the Defendant in a Writ of Right of Ward may rebutt the Plaintiff by this Warranty, and shall not be put to his Action of Covenant, to avoid Circuity of Action. [b]

85. *Matter of Vexation.*

A Man shall not have an Action on the Case for not celebrating Divine Service in his Chappell of D. within his Manor of S. *Hominibus tenentibus & servientibus suis* inhabiting within the said Manor, (but Remedy shall be had in the Spiritual Court) for here the Chappell is not private to himself and his own Family, but public to all the Tenants, and then every one of the Tenants should have an Action as well as the Lord himself, and so there should be a Multitude of Suits^x.

86. *Infinitude.*

A Feme received shall not vouch her Husband and herself for the Cause, viz. of Frankmarriage, or the like, as Heir to the Father, for then the Husband when he is summoned may make Default, and the Feme shall be received; so the Process would be infinite^y.

An Act of Explanation, as 32 H. 8. c. 36. which explains 4 H. 7. c. 24. of Fines, shall not be construed against the Letter, for then it would be requisite to have a new Act to make an Explanation and Exposition upon that Explanation and Exposition, and so *in infinitum*^z.

87. *Decency.*

An Abbot, or Prior, or Man of Religion, in doing of Homage, shall not say, Sir, I become your Man, but Sir, I will do to you Homage, &c. for he hath professed himself to be only the Man of God^a.

Nor shall a Feme sole, when she doth Homage, say, I become your Woman, for it is not proper that she should become a Woman to any but to her Husband, when she is married^b.

A Woman shall not be quartered for Treason, out of Decency to the Sex, but only shall be drawn and hanged^c.

^x William's Case. 5 Co. 72 b. 1 Rol. Abr. 110. 9 Co. 112. b. 1 Sid. 34. pl. 2. 1 Cro. 664. 2 Brownl. 147. ^y 5 Ed. 3. 190. b. ^z 3 Co. 31. a. 87. b. 88. ^a Littlel. §. 86. ^b Littlel. §. 87. ^c Stamf. P. C. 182. Post. 23. a. 2 H. H. P. C. 399.

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The King shall not name any one *Lord*, or the like, in his Writ, for that is not decent nor becoming the Majesty of a King; and in such Case Variance between the Obligation and Writ shall not abate the Writ^d.

Upon a Plea to the Jurisdiction of the Court, the Defendant shall not conclude *Judgment if the Court ought to have Conizance*, but *Judgment if the Court will have Conizance*^e.

And where a Man pleads in Barr against the King, he shall conclude *Judgment if the King will be answered*^f.

The Law construes Things,

88. *With Equity and Moderation*. And therefore

It moderates the Strictness of the Law itself.

In abridging, diminishing, and mitigating the Severity thereof, and in mollifying its Strictness^g. And this is a Moral Virtue, as Plowden^h saith, and may appear by Aristotle, who defines it *κατόρθωμα τῶ νόμῳ ἢ ἑλλείπει διὰ τὸ καὶ ὅλως*, *A Correction of the Law, where it is defective by reason of the Generality thereof*ⁱ.

[15] It is no Trespas for a Man to beat his Apprentice with moderate Correction^k; nor to take and carry away the Wife of another Man against the Will of her Husband to a lawful Intent, as to sue a Divorce against her Husband, to have the Peace against him before a Justice of Peace^l.

A great Part of the Profoundness of the Law, if a Man considers the Reason of the Law, is grounded upon this, and the other Kind of Equity which was before; of both which Plowden in the Case of *Eston* and *Studd* discourses at large, and shews very well the Nature of them as to the Interpretation of Statutes; but they have a greater and more resplendent Use in the Exposition of the common Law itself, as in the Cases here put.

89. *It restrains a general Act, if there be any Mischief or Inconvenience in it.*

^d 8 H. 6. 23. b. ^e Post. 56. a. Rast. Entr. 101. a. pl. 3. 1. Mod. Entr. 2. ^f 47 Ed. 3. 11. ^g Dr. & Stud. 1. 1. c. 16. ^h Plowd. 465. ⁱ Arist. Ethic. lib. 5. cap. 10. ^k 21 Ed. 4. 53. ^l 21 H. 7. 13. Noy's Max. 13.

Tenant for Life leases for Life without saying for whose Life; this shall be intended for the Life of the Lessor, for otherwise it should be a Forfeiture of his Estate ^m.

Where one grants a Common for all Beasts, yet he shall not have a Common for Goats nor Geese, nor other Beasts not commonable ⁿ.

Where a Man makes a Feoffment of all his Lands within the Town of D. with Common in all his Lands, this Common shall be intended within the same Town of D. and not others ^o.

The Law construes Things

for the better; and therefore it construes,

90. *Every Act to be lawful, where it is indifferent if it be lawful or not.*

If a Disseizor comes upon the Land, and does any Act so that the Disseizor might have an Action against him if he were a Stranger, the Law saith, that sooner than he shall be punished, his Entry was with the Intent to be remitted ^p.

In an Action of Trespafs, of two Trespafses, and two Issues joined, triable in two Counties, the one in London, the other in Middlesex, if the *venire facias* issues to the Sheriff of Middlesex only (without saying what Issue to try) this shall be taken to try the Issue in Middlesex only, for by this Means the *venire facias* is lawful, and not to try the Issues in both the Counties, which is against Law. And for this Reason this is a Discontinuance of the Issue in London, and not a Miscontinuance ^q.

CHAP. IV.

Of Law-Constructions which are genuine.

THE foregoing Rules were such as were derived out of other Sciences. These that follow are peculiar to ourselves, and are called Law-constructions.

^m Co. Litt. 42. a. 183. a. b. ⁿ Plowd. 161. Post. 36. a. b.
^o 36 Aff. pl. 3. ^p Plowd. 92, 93. ^q 11 H. 7. 5.

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And these are genuine, or feigned. Of the first Sort are two Notable Grounds.

The Law construes Things,

91. *Reasonably.*

[b] An Abbot grants a Corody to one and his Servant to sit at his Table, he shall not bring one who hath a bad Disease^r.

By a Grant of Estovers out of a Manor, the Grantee shall not cut Fruit Trees^s.

And therefore,

92. *According to the Intent.*

Upon a Feoffment by Deed of a Manor with an Advowson appendant, and Livery not made, the Advowson shall not pass, yet the Advowson may pass without Livery, but the Intent was that the Manor and this should pass together.

In a Bargain and Sale of Land and the Reversion by Deed, not enrolled, none of them, viz. neither the Reversion nor the Land, shall pass, altho' that by the Deed without Enrollment the Reversion may pass, but the Intent was, that both should pass together.

Where an Abbot is to find a Chaplain by Prescription, and it is recited by Deed between them that whereas there is a Controversy of and concerning that which the Abbot hath used to do, as above, the Abbot grants by the same Deed to do it, this shall not determine the Prescription, inasmuch as the Deed recites the Prescription, and so the Intent of the Deed is only to confirm the Prescription, and not to make a new Grant^t.

93. *According to the Effect.*

Where a Deed takes any Effect at the first Delivery, the second Delivery is void; ^u as a Deed delivered by an Infant may not be delivered again at his full Age, for it was of some Effect at the first, and was but voidable; but a Deed delivered by a Feme-Covert, or a Release delivered to him who hath nothing in the Land, may be delivered again, viz. when she comes to be Sole, or if the Party to whom the Release is made, purchase the Land, for the first Delivery was utterly null and void, and of no Effect^w.

^r Plowd. 161.

^s Ibid.

^t 21 H. 7. 5.

^u Noy's Max. 55.

^w 1 H. 6. 4.

So that,

He, who may not have the Effect of a Thing, shall have the Thing itself.

The King shall not be received after Default of his Tenant for Life, because the Demandant should not have the Effect of the Receipt, viz. to count against him *de novo*; for none shall count against the King, but shall sue to him by Petition^w.

Two Abbots may not be Jointenants, for they may not have the Effect of Jointenancy, viz. Survivorship.

94. *To the most Validity, ut res magis valeat quam pereat.*

Tenant in Tail makes a Lease for Life, this shall be intended for the Life of the Lessee^x.

Annuity granted *pro consilio impendendo*, or a Feoffment *ad erudiendum Filium*, or *ad solvendum* 10 s. is a Condition without Words conditional; for that otherwise, the Party shall be without Remedy^y.

And for this Cause,

95. *When many join in an Act, the Law saith, it is the [16] Act of him who can best do it.*

An Use limited to commence when my eldest Son (in Ward of the King) is married by J. S. he is married by the King and J. S. yet no Use arises, for it is the sole Marriage of the King. A Patron, who suffers an Usurpation by six Months, grants an Annuity to J. S. until he be promoted to the Benefice by him, and afterwards he and the Usurper join in the presenting the Grantee, yet the Annuity is not determined^z.

The Disseizee, and the Heir of Disseizor in by Descent make a Feoffment by one Deed and Livery, this is the Feoffment of the Heir only, and the Confirmation of the Disseizee^a.

96. *When two Titles concur, the better Title is preferred.*

The Disseizor leases the Land to the Disseizee for Years, or at Will, now if he enter, the Law saith, that he is in, of his ancient, and better Title^b.

^w 25 Ed. 3. 48. 4 Ed. 3. 38. 2 Inst. 346. ^x Co. Litt. 42. a. ^y Plowd. 141. Co. Litt. 204. a. 236. b. Hob. 41. ^z Dyer 191. a. ^a Noy's Max. 15. Littlet. §. ^b Littlet. §. 695.

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97. *Things shall be done by him who hath the greatest Skill to do them* ^c.

An Obligation upon Condition, that a Bell shall be carried by the Obligee to the House of the Obligor (being a Brazier) and there shall be weighed and put into the Fire, and then the Obligor to make a Tenor to agree in Tune, and Sound to the other Bells; the Obligor shall weigh it and put it into the Fire, (inasmuch as it is not expressed who shall do it) for this belongs to his Office, because he hath the greatest Skill to do it ^d.

If the Condition be, that the Obligee shall carry to the Shop of the Obligor (being a Taylor) three Yards of Cloth, which shall be there cut out, and then that the Obligor shall make the Obligee a Coat of it, the Obligor, (viz.) the Taylor, is bound to cut it out ^e.

A Merchant agrees with the King's Collector, that his Merchandize shall be weighed at the King's Beam, and the King to have the Subsidies arising therefrom; the Collector shall weigh it ^f.

Issue joined shall be tried by those who have the most Skill, viz. Issue in Law, that is, a Demurrer by the Justices learned in the Law, &c ^g.

Attendance upon the King to Scotland in the War for forty Days, by him who holdeth by Escuage, shall be tried by Certificate of the Marshal of the King's Host ^h.

Disseizin of an Office in the Common Bench, or Rasure of a Record there shall be tried by the Filizers and Attornies attending in that Court ⁱ.

98. *Void Things shall be good to some Purpose.*

Lessee for twenty Years takes a Lease for ten Years, to commence presently, upon Condition to be void; although the second Lease be void upon the Condition broken, yet the Surrender, which was in Law, shall remain good ^k.

Feoffment upon Condition to be void, as if it had not been at all, ^l yet the Feoffee (after Entry of the

^c 2 Inst. 425. Co. Litt. 96. a. ^d 9 Ed. 4. 4. Plowd. 15.

^e Plowd. 15. ^f Plowd. 15. ^g Plowd. 231. Post. 62. b. ^h Litt.

ⁱ 11 Ed. 4. 3. b. ^k Plowd. 107. ^l 10 H. 7. 22.

Feoffor for Condition broken) shall have an Action of Trespas for a Trespas done by the Feoffor, between the Feoffment and Condition broken.

99. *One Thing shall enure as another.*

[b]

If the King grants to the Town of D. the same Liberties which London hath, this shall be intended the like Liberties ^m.

Lessor infeoffes Lessee for Life by *Dedi et Concessi*, and makes Livery thereupon, this shall enure as a Confirmation ⁿ.

A Man grants the third Presentation of an Advowson and dies, the Heir shall present twice, and the Feme shall have the third for her Dower, and then at the next Avoidance after this, the Grantee shall present, so that he shall have but the fourth ^o.

The King pardons the making of a Bridge, this is only good for the Fine for not doing it; but notwithstanding this he shall build the Bridge, for all the King's Subjects have an Interest therein ^p.

100. *In one Thing, all Things following shall be included.*

By Exception of a Thing, as in a Lease ^a, except a Close, Woods, &c. the Law gives to him ^b Means to come to the same, viz. a Way, or the like; and where the Law gives ^c Mines to the King, it gives him Power to dig in the Land, and such other Conveniences to come to the Effect thereof.

Grantee of all my Trees growing in my Close, may come upon the Land to cut them, and carry them through my Land; and although my Grasse be trod down with the carrying thereof, I may not have a Writ of Trespas for the same ^q.

Vendee of all the Fish in my Pond, ^r may come to the Bank to Fish, but may not dig a Trench, so that the Water may run out, and by that means take the Fish; for he may take them by Nets, or other Engines;

^m 11 H. 7. 13. ⁿ Littlet. §. 532. ^o 15 H. 7. 7. Dyer 35. pl. 30.
Bac. Elem. 54. Co. Litt. 379. a. ^p 37 H. 6. 4. ^a 14 H. 8. 1.
^b 2 Inst. 306. 326. 4 Inst. 111. ^c Plowd. 317. ^q 2 R. 2. Fitz.
Barr. 237. Hob. 234. ^r Hob. 234.

but if there were no other Means to take them, he may dig a Trench.

[101.] *Every Act shall be construed most strongly against the Doer.*

Two Tenants in Common grant a Rent of 20 s. this is several, and the Grantee shall have 40 s. but if they make a Lease reserving 40 s. they shall only have 20 s. between them^s.

Obligation to pay £20. before the Feast of our Lord's Nativity, it is no Plea that he hath paid it, but he shall shew at what Time, for otherwise it shall be taken, that he paid it after the Feast^t.

And therefore,

[102.] *A Man shall not qualify his own Act.*

Obligee releases his Duty to the Obligor until Michaelmas, now the Duty is gone for ever.

Upon a Grant of the Reversion of three Acres, and the Tenant attorns for one, this is good for all^u.

A Parson makes a Lease for forty Years, Patron and Ordinary confirms the said Demise for twenty Years, yet this Confirmation extends to the whole Term^w.

[17] [103.] *The Construction which otherwise the Law would make, shall be altered by the special Agreement of the Parties. Modus et conventio vincunt legem^x.*

If Houses let for Years, are thrown down by the Violence of the Wind, the Lessee is excused of Waste; but if he covenants to repair them, an Action of Waste lies, for his special Agreement alters the Law^y.

Two Jointenants of an Acre exchange it with a Stranger, they shall be Jointenants of the Land exchanged; but if the Exchange be to have the Acre in common between them, this is good^z.

[104.] *Special Words of the Parties.*

A Lease^a reserving Rent, the Heir shall have the Rent. Otherwise^b if it be reserved to the Lessor.

^a Noy's Max. 14. Plowd 140, 161, 171. Co. Litt. 197. a. Perk. 22. h. ^b Plowd. 104. Noy's Max. 14. ^u Ante, 13. a. 18 Ed. 3. Fitz. Variance 63. ^w Poord's Case. 5 Co. 81. a. ^x Hob. 40, 160. ^y Dr. & Stud. 1. 2. c. 4. Plowd. 29. a. Noy's Max. 16. 10 Ed. 3. 5. ^z Perk. 55. f. 56. g. ^a 27 H. 8. 19. Co. Litt. 47. a. Dyer 45. pl. 2. ^b Dyer 45. pl. 1. Co. Litt. 47. a. 12 Co. 36. Plowd. 171. 2 Saund. 368. Kelwey 88. b. contr.

Feoffment in Fee with Warranty to the Feoffee, the Heir of the Feoffee shall not have Benefit of this Warranty.

105. *Surplusage of Words.*

The ^c Ordinary may refuse generally him who demands his Clergy without speaking the Reason; but if he express a Cause, which is not lawful (as that he hath not his Tonsure, or Clerical Ornament, &c.) there he shall make a Fine, and shall take the Felon.

In *Value of Marriage*, and Count of a tender of Marriage to the Defendant, the Tender is traversable now, tho' otherwise it would not have been ^d.

In Information upon a Statute, if he declare that the Statute was made such a Day, where it was made at another Day, it shall abate, altho' he need not to have shewn the Day ^e.

In Action of Debt by J. S. Parson of D. *nul tiel vill* as D. is a good Plea; yet he need not to name him Parson of D ^f.

A Writ of Forgery of *diversa Facta et Munimenta*, and Count only of one, the Writ shall abate, yet he might have said in his Writ only *Factum* ^g.

CHAP. V.

Of Fictions in Law.

FEIGNED Construction (which we call Fiction in Law) is when in a similitudinary manner the Law construes a Thing otherwise than it is in Truth. And it is of a Person, Thing, Action, or of the Circumstances attending the same, as Time and Place.

Of a PERSON.

106. *Qui per alium facit per seipsum facere videtur.*

Assumpsit to a Feme in Consideration of a Thing to be performed by the Husband, if the Husband agree and perform the Consideration, now in an Action upon the Case, he may count that the Assumpsit was made to himself ^h. [b]

^c 9 Ed. 4. 28. b. ^d Dyer 255. pl. 6. ^e Plowd. 84. ^f Plowd. 84. ^g 20 H. 6. 42. ^h 27 H. 8. 24. Noy's Max. 17.

If a Servant sell my Goods, and I agree, in an Action of Debt, I may suppose that he bought them of me ¹.

Of THINGS, we have these two Rules.

107. *A Thing which comes in lieu of another Thing, is as the Thing itself.*

A Man shall recover in Value against the Heir, (upon the Warranty of his Ancestor) the Lands which he took in Exchange for the Lands descended ^k.

Upon a Manor given by Fine, a *Scire Facias* lies of the Tenancy, which afterwards escheats ^l.

If a Manor descends to an Infant, and afterwards the Tenancy escheats, he shall have his Age of this in a *Præcipe* of the Manor, and shall vouch of the Tenancy by Reason of the Warranty made of the Manor, for the Tenancy came in Lieu of the Services. And such Land escheated shall be Assets by Descent ^m.

108. *Things which amount to the same, are all one with the principal Thing.*

Continual Claim made by *Mulier Puisne*, takes away and destroys the Right of *Bastard Eigne*, for this amounts to an Entry ⁿ.

A Lease for a thousand Years, is a Lease for Years ^o.

A Lease for Years, and Release, amounts to a Feoffment ^p.

A License to occupy Land for a Year, is a Lease for a Year ^q.

And therefore,

109. *A Thing which ought not to be done, is as if it was not done.*

A Rent Charge granted without the Words *pro se et Hæredibus*; Grantee brings a Writ of Annuity against the Heir, and hath Judgment to recover, yet he shall distrain afterwards, for the Heir was never chargeable, so that upon the Matter, this was never any Election at all ^r.

¹ Noy's Max. 17. ^k 18 H. 3. Fitz. Recov. in Val. 26. ^l 48 Ed. 3. 11. ^m 6 H. 4. 1. ⁿ 14 H. 4. 9. ^o 14 H. 8. 13. Brook. ^p 11 H. 4. 33. ^q 5 H. 7. 1. Bro. Lease 30. ^r Dyer 344. pl. 2. Lease

Lease for Years of a House and Implements reserving Rent, the Executor of the Lessor receives the Rent, yet this is not Assets in their Hands, for all belongs to the Heir^a.

110. *So of a Thing done at a Time when it ought not.*

A Man seized in Fee leases for ten Years, and afterwards sells it, and takes it back to him and to his Wife, they lease for twenty Years rendering Rent, the Husband dies, the Wife accepts the Rent during the ten Years, now by this the second Lease is not affirmed, for Acceptance of a Rent before the Lease commences, and so before any Rent is due, is not any Acceptance^b.

Matter pleaded or disclosed not in due time, is as if it was not pleaded at all: As in an Action of Debt upon an Obligation, and count that the Defendant was of full Age at the Time, the Defendant shall not take Traverse to this, but only shall say, that he was within Age, and the Traverse shall come on the Part of the Plaintiff.

To the Circumstance of TIME, these two Rules do belong. [18]

111. *Priority of Time is in respect of Things done together.*

A Devise of a Term to the Son, and that his Wife shall have it during the Minority of the Son; this shall be first a Devise to the Wife, and afterwards to the Son when he comes to his full Age.

A Man grants his Reversion of Land, and by the same Deed grants a Rent out of it to another, and delivers the Deed to both at one and the same time, this shall enure as to the Rent first.

112. *Which happen in an Instant.*

Mesnalty of Land holden in Chivalry, descends to the Tenant of the Land, altho' that the Mesnalty is at the same Instant extinct, yet the Tenant shall pay Relief, if he be of full Age, or shall be in Ward, if he be within Age^c.

^a Dyer 361. pl. 15. ^b 1 Ed. 6. Bro. Acceptance 18. ^c Plowd. 540. Vide Post 46. b. ^d 11 H. 7. 12.

THE FIRST BOOK

Land given to A. for the Life of B. Remainder to the right Heirs of B. this is a good Remainder, altho' he may not have a right Heir during his Life. But it suffices that the Remainder doth vest at the same Instant that the particular Estate determines ^x.

An Exchange of Land to have a Rent-Charge out of the same Land is good, altho' it be in an Instant (so that the Rent merge in the Land) for the Law Accounts the Exchange of the Land to be first executed ^y.

113. *Things which relate to a Time long before, are as if they were done at the same Time.*

A Feme, who is endowed by the Heir, shall be said to be in immediately from her Husband, so that if the Husband were a Disseizor, and the Heir in by Descent, yet the Disseizee may enter upon the Feme ^z.

Goods taken out of the Possession of an Executor who refuses, and afterwards Administration is committed to J. S. J. S. may have Action of Trespass, and shall suppose, that they were taken out of his own Possession; for he shall be said Administrator from the Time of the Death of the Testator ^a.

These Rules of common Reason do many Times cross and clash with one another; whence arises the great Difficulty we meet with, when any Case is to be argued: But for the Help thereof the general Ground is according to the Rule 47.

That

114. *Those prevail which are of the most excellent and perfect Reason.*

[b] Debt does not lie except it be upon a Contract where there is *Quid pro Quo* ^b (Rule 48.) yet if I promise to a Surgeon £10. to cure a poor Man, or to a Labourer £10. to repair the Highway or a Bridge, there these are Works of Charity, as *Quid pro Quo*, and Debt lies for them (Rule 64.) ^c

Things executed, where the Husband is seized in Right of his Wife ^d, shall not be avoided by Divorce, as Waste, Receipt of Rent, Seizure of a Ward, Pre-

^x 7 H. 4. 6. Co. Lit. 298. a. ^y 9 Ed. 4. 6. ^z Litt. 5.
^a 36 H. 6. 7. ^b 17 Ed. 4. 5. ^c Plowd. 305. ^d 32 H. 8. Bro.
 Deraignment 18.

sentation to a Benefice, Gift of the Goods of the Wife, &c. (Rule 46.) But otherwise it is in Matter of Inheritance, as if the Husband discontinue or charge the Land of the Wife, release or manumise Villains, &c. (Rule 33.)

Feoffee with Warranty dies, having two Daughters, who make Partition of the Land, now this Warranty shall be divided notwithstanding the Partition, which is their own Act (Rule 52.) For the Land comes to them originally by Act in Law, viz. by Descent (Rule 8.)^e

If a Chancellor die before the Privilege of his Servant be decided *in Banco*, yet this shall be allowed notwithstanding the Cause is removed, (contrary to Rule 6.) but the Reason is, because that once he had Cause of Privilege, and the Act of a third Person, viz. of the Court, shall not prejudice him (Rule 70.)^f

Husband possessed of a Term in Right of his Wife, makes a Lease of Parcel rendring Rent, the Wife shall have the Residue of the Term, but not of the Rent, (Rule 12.) notwithstanding that it comes in lieu of the Land (Rule 107.) and be as an Accessary to the same (Rule 28.)^g

If one of a Chapter infeoffe the Dean and Chapter, he himself shall take by his own Livery (Rule 21.) notwithstanding Rule 23.^h

Counts and Declarations ought to be certain (Rule 76.) yet Things, which contain an unnecessary Implication, are good (Rule 108.) as in *Ejectione Firmæ*, and Count of a Lease by Tenant for Life, 'tis sufficient to say, that the Lessor is yet seized without alledging his Life expressly.ⁱ

In an Information upon the Statute of Usury, and count that Defendant hath taken *per viam et medium corruptæ mutuationis*, where it ought to be *accommodationis*, is yet good.^k

^e 38 Ed. 3. 20. b. Bro. Garranty 27. ^f 35 H. 6. 3.
^g Ante. 4. b. ^h Perk. 41. ⁱ Dyer 304. pl. 57. ^k Dyer
347. a.

Hitherto have we spoken of Laws Native; the Law of Nature, and the Law of Reason, or the Law of Reason primary, and the Law of Reason secondary; and the Rules, Frames, and Collections out of them both. And these three Laws are as the Sun, Moon, and seven Stars, to give Light to all Positive Laws in all the World.

Positive, are those Laws which every Common-Wealth makes for itself. And of this come the Grounds and Maxims of all Common Laws, for that which we call the Common Law, is not a new and barbarous Name, and peculiar to the Laws which we profess, but is the right Name of all other Laws. So Euripides mentions νόμος κοινὸς ἑλλάδος the Common Law of Greece. So also Plato defines it¹, where he speaks of the λογισμὸς, the reasoning Faculty, ὃς γενομένη (saith he) δόγμα πόλεως κοινὸν νόμος ἐμπωνόμασαι, which being received by the common Consent of the City, that is, the State or Common-Wealth, hath the Name of Law. And there he calleth it, τὴ λογισμῷ τὴν ἀγωγὴν χρῶσθαι καὶ ἱερὰν, τῆς πόλεως κοινὸν νομὸν ἐπιταλαμένην. The Golden and Sacred Rule of Reason, which is called the Common Law. The Place there in Plato, is very notable, for it discovers the Fountain and the Original of the Common Law, it shews the Antiquity of it's Name, in Effect all one with that, which afterwards, and by a more new Name, is called *Jus Civile* (*Quod quisque Populus ipse sibi jus constituit*, as Justinian defines it) it shews us, that the Common Law is no other than Reason. But what Reason? Not that which every Man frames to himself, but refined Reason, ^m which when it is grown up, and is perfect, is rightly named Wisdom, as Cicero speaks ⁿ, and as Plato, in the Place before mentioned, saith, when this comes to be δόγμα opinio, seu de-

¹ Plato de Legibus, l. 1. ^m Co. Litt. 97. b. 12 Co. 65.
ⁿ Cicero de Legibus, l. 1.

cretum. How? δόγμα πόλεως κοινόν, generally received the the consent of all.

And for this Cause Laws positive, which are directly contrary to the Laws native, lose their force, and are not to be reputed as Laws at all; ° such are those which are contrary to the Laws of Nature. Such was the Law of the Egyptians, where Women were put to Merchandize and the Affairs of the Common-Wealth, and the Men to keep the Houses^p. Such was also the Law of the Thracians, where Idleness and Theft were esteemed Things commendable^q. So if a Law^a were made, that a Man might commit Adultery, forge false Deeds, or the like. And this is sufficiently plain and manifest to all, being of such Things as are against the Law of Nature. But inasmuch as the Law of Reason is known, but by such as can judge well, and by these also but imperfectly known (as we have shewn before) for this Reason a Case is the more difficult to be known, what Laws shall be said to agree, or disagree to the same; only in general, (as suffices in this place, and to our present Purpose) it is truly said, and ought to be assented to by all, that the Laws which do in reality contradict the Law of Reason, are null and void, as well as those which contradict the Law of Nature^b.

Positive Laws, are of sundry and divers sorts, according to the several and divers Constructions of particular Places and Countries. Such were the political Laws of Moses, which he shewed to the Jews; the ancient Laws of the Greeks; the twelve Tables of the Romans; and as many different People as there are, so many different Laws are there. And as these Laws differ one from another, so the same Laws may be alter'd and changed, so long as no Alteration be permitted to be made, whereby they shall clash with the two main Laws, of Nature and of Reason. But to leave all others, such also is the Common Law of England, of which in the ensuing Books, we are to speak.

° Dr. & Stud. lib. 1. c. 2. 19. ^p Herodotus, lib. 2. ^q Herodotus, lib. 5. ^a Cicero de Leg. lib. 1. ^b Dr. & Stud. supra.

[20] *The* SECOND BOOK.

CHAP. I.

Of the Common Law, Customs, Prerogative and Estates.

[d] **T**HE Common Law, is a Law used for Time immemorial throughout the whole Realm of England, for the Benefit of every Man therein. The very Name of the Law (for as the Orator saith, Silent Leges inter Arma) makes the Difference between it and the Courts of the Constable and Marshal, which are established for Matters of War, when the Law and Justice may not have their current Course. And inasmuch as the Common Law (as all other Human Laws) hath its Place in Civil Affairs, it is by that distinguished from the Spiritual and Ecclesiastical Law. *The Realm*, serves not only to exclude ^a Scotland, ^b Wales, Ireland ^c, or the like, where the Common Law does not meddle, but also to distinguish it from the Law of the Admiralty, which is for Things done upon the High Sea, and not within the Body of any County of this Kingdom. *Used for Time Immemorial*, excludes Statute Laws, which are made within Time of Memory by Act of Parliament. and lastly, when we said, *throughout the whole Realm*, Customs in particular Places are excluded.

[b] The Realm of England is divided into several Counties, in all thirty-nine; Kent, Suffex, &c. and every County hath in it several Towns, that is to say, a Precinct, which anciently contained ten Families, as it seems, which in some Books are called Tithings. And therefore ten of these make a Precinct, which is called a Hundred. Many of these Towns have Hamlets within them. And there are some Counties, which are out of any Town or Hamlet ^d.

^a 8 R. 2. Fitz. Continual Claim. 13. Hal. Hist. of the Law 189.
^b Plowd. 129. Hal. Hist. of the Law 177. ^c Plowd. 368.
 Saunders. ^d 12 H. 7. 18. Fineux.

In some Counties, Towns, and other particular Places of the Realm, there are special Usages, which have been for Time Immemorial there continued^d, varying from the Common Law, which we call Customs: As in Kent, the Custom of Gavel-kind, that all the Males shall equally inherit, and that the ^e Wife shall not lose her Dower, nor the Heir his Land, where the Husband or the Ancestor is hanged for Felony. In London, that if the Debtor be absconding^f, the Creditor may arrest him before the Day of Payment, to make him find Sureties. In many Boroughs, that the ^g youngest Son shall inherit, the Wife^h shall have for her Dower, &c. all the Lands of her Husband; the Land shall be devisableⁱ by Testament, &c. And these Customs hold not Place but in a County, Town, Manor, or such special Place^k. For if a Man will plead, that there is a Custom between Merchants throughout all the Realm, that they may assign Licenses over, this is not good; for that which is current throughout all the Realm, is the Common Law, and no Custom.

The People of England are, the King, and common Persons his Subjects.

The^l King is the Head of the Weal-Public; immediately under God; above all Persons, and in all Causes. And therefore, inasmuch as he resembles the Person of God, and bears his Image amongst Men, the Law attributes to him in a similitudinary Manner, the Shadow of the Excellencies peculiar to God, viz.

Soveraignty. All Lands are holden of him^m. No Action lies against himⁿ: For who shall command the the King? He shall not make demand, or tender, when a Lease is made, reserving Rent with Clause of Re-entry^o.

^d Littell. §. 169. Hob. 86. ^e 8 H. 3. Fitz. Prescrip. 60.
^f Long. 5 Ed. 4. 30. Hob. 86. ^g Littell. 165, 211. ^h Litt. §. 166.
ⁱ Ibid. 167. ^k 34 H. 8. Bro. Custom, 59. ^l 1 H. 7. 10. Fleta. l. 1. c. 17. ^m 7 Ed. 4. 17. Co. Litt. 1. a. b. ⁿ 21 H. 7. 2 Post. 76. b. Plo. 241. 14 H. 8. 3. Fleta. l. 1. c. 8. pl. 4. ^o 2 H. 7. 8. b. 9. b. Plowd. 213, 243. Bro. Prerog. 101. Bro. Condit. 125. Bro. Ent. Cong. 88.

Power. He ^p may command his Subjects to go out of the Realm in War; may make any foreign ^a Coin current here, by his Proclamations.

Majesty. He may not ^r take, nor part ^r with any Thing, but by Matter of Record, except a Chattle ^r, or the like; *quia de minimis non curat lex.*

Infiniteness in a manner: Being present in all his Courts, as a Man may say, in every Place. Wherefore in a Writ ^u of Error, where false Judgment is given for the King in any Action or Suit, the Party shall assign his Errors without any *Scire Facias* against the King to hear Errors, because the King is ever present in Court. And this is the Reason that the Form of Entry of Suits for the King is such; A. B. *Attorney of the Lord the King, who prosecutes for the Lord the King, &c. comes here into Court,* and not *the Lord the King by A. B. his Attorney, comes here into Court,* because the King is always present in Court. And this is the Reason, that the King may not be ^v Nonsuited: And that all Acts of Parliament which concern the King are ^x general, and the Court shall take Notice thereof without Pleading them; for the King hath an Interest in all his Subjects.

Perpetuity: Having perpetual Succession, and never dies, for in Law it is called, the *Demise* of the King. A Gift to the King without more saying, goes to his Successors: For he is a Corporation of himself, and hath two ^y Capacities, that is to say, a Body Natural, (in which he may inherit to any one of his Ancestors, or purchase Land to him and the Heirs of his Body, which he shall retain altho' he be removed from his Estate Royal) and a Body Politic, in which he may

^p 7 Co. 7. b. Calvin's Case. ^a 5 Co. 1. 4. b. V. Mirr. c. 1. §. 3. ² Inst. 576. ^r 5 Ed. 4. 7. Post. 50. b. Plowd. 213. ^s 2 H. 4. 7. b. ^t 1 H. 7. 19. ^u F. N. B. 21. k. ^v 7 H. 4. 37. ¹ H. 7. 13. ² R. 3. 2. ²⁵ Ed. 4. 7. Sed Vide, where a Writ went to the Justices to examine the Errors, hoc non obstante. 24 Ed. 3. 35, 36. Hill. 29 Eliz. 3. Hughes, 308. ^w 25 H. 8. Bro. Nonsuit, 68. ⁶ R. 2. Fitz. Nonsuit 13. Co. Lit 139. b. ²⁰ H. 7. 5. ² Rol. Ab. 131. ¹² Co. 64. ^x Plowd. 231. ^y Plowd. 234. 6 Co. 27. a.

purchase to him and his Heirs Kings of England, or to him and his Successors.

^a *Perfection*; for no Latches, Folly, Infancy, or Corruption of Blood is presumed in the King; so that *nulum tempus occurrit Regi* †. His Grant may not be avoided for Non-age; altho' it be of Land which he hath in his natural Capacity: By the † taking upon him the Imperial Crown, the Attainder of his Person is *ipso facto* purged.

Truth; He shall never be ^a estopped; Judgment final ^b in a Writ of Right shall not conclude him.

Justice; He may not be ^a a Disseisor ^c, nor do any Wrong ^d.

Statutes.

1 Mar. Parl. 2. cap. 1. *The Regal Dignity with all the Privileges and Preeminencies, is as fully and entirely in a Female as Male.*

Out of the Excellency of his Person, as out of a Fountain, issue divers ^a Prerogatives which the Law gives unto him, in Things not injurious to his Subjects; whereof some, which declare his Prerogative in Things which in their Nature appertain to Subjects also, I shall put in the Margent; the others, which are, as a Man may say, more in the Royalty, being Regalities or the like, proper to him, shall ensue by themselves.

In regard of the King, the Queen his Consort is Partaker of divers Prerogatives above other Women: ^f As an Act of Parliament, which makes all Gifts or Grants to her or by her (whether it be between the King and her, or between her and another Person) to be of the same Effect as if they were between other Subjects without any Benefit thereof to come to the King, need not be pleaded, but the Court and all the Realm shall take notice thereof, because she is a public Person, in whom all the Subjects of the Realm have an Interest, being the Wife of the King, as well as they

[b]

^a 35 H. 6. 26. † Plowd. 213, 238, 243, 261. Co. Litt. 43. a. Bro. Prærog. 132. † 1 H. 7. 4. ^a Plowd. 331. ^b 18 Ed. 3. 38. 20 Ed. 3. Fitz. Droit. 15. ^c 35 H. 6. 61. 10 H. 6. 15. Bro. Entry. Congeab. 128. 12 Co. 64. ^d Plowd. 264. ^e 12 H. 7. 19. ^f Plowd. 231. Co. Litt. 133.

have

have in the King himself. Also, she may have to herself the Possession of personal Things during her Life: So that she ^z may have an Action in her own Name; take by the King's Charter Lands and other Possessions; make ^a Leases, Feoffments, &c. which shall be good for her Life, but afterwards the King shall have them. And many other Prerogatives she hath, whereof shall be spoken hereafter.

His Subjects are the Members of the Weal-public; and are Barons, or Commons.

Barons we call the Peers of the Realm, who have also divers Privileges, as shall afterwards appear, above other Men.

The Commons are all other Persons in the Realm.

Statutes.

25 Ed. 3. Stat. 2. De natis ultra mare. *The Children of the King are inheritable by the Common Law, in whatsoever Place they be born.*

All Persons born out of the Allegiance of the King, their Father and Mother being at his Allegiance, shall be inheritable, so that their Mother pass over the Sea by License of the Husbandⁱ.

42 Ed. 3. cap. 10. *confirms this Part of the Statute*
25. Ed. 3.

The Assembly of all the Three Estates, viz. the King, Nobility, and Commonalty, which compose the Body of the Realm, is called a Parliament, and their Decree, an Act of Parliament; for without all three, (as if it be done by the King and Lords, but nothing said of the Commons) it is no Act of Parliament ^k.

Statutes.

33 H. 8. cap. 21. *Declares and enacts, that the King's royal Assent by his Letters Patent under his Great Seal, and signed with his Hand, and notified in his Absence to the Lords Spiritual and Temporal, and to the Commons, assembled together in the High-House, is, and ever was, as good as if he were there personally present.*

^z 49 Aff. pl. 8. ^a 3 H. 7. 14. ⁱ Vide 11 & 12 W. 3. c. 6.
^z Anne, c. 5. ^k 4 Geo. 2. c. 21. de hac re. ^k 4 H. 7. 18. Dyer,
60. pl. 19. Plowd. 79. Co. Litt. 109, 110. 2 Inst. 137, 334.
4 Inst. 25.

The Parliament hath an absolute Power in all Cases¹, as to make Laws, to adjudge Matters in Law, to try the Life of a Man, to reverse Errors in the King's Bench; especially where there is any common Mischief, which the ordinary Course of the Law hath no Means to remedy, in such Case this is the proper Court. And all Things which they do are as Judgments. And if the Parliament^m itself err, as it may, this may not be reversed in any Place but in Parliament.

Prerogative.

The King may license Things prohibited by Statute; as to coin Money,^a which is made Felony by a Statute, and before that was lawful to be done by any; for this is but *Malum prohibitum*; but *Malum in se*, as to raise a Nuisance in the Highway, the King may not license a Man to do, but after it is done, he may pardon it.

But if a Statute saith, that his License shall be void, there the^o License shall have a Clause of *Non obstante*, viz. it shall say, *Non obstante* any Statute to the contrary, or otherwise it is not good. As the Statute 23. H. 6. cap. 8. is, that the Grant of the King to be Sheriff of a County longer than one Year, shall be void, notwithstanding that his Patent have in it a Clause of *Non obstante*; yet with a Clause of *Non obstante* such Patent shall be good, but not without the Clause. But neither without such Clause nor with it, can it dispense

PREROGATIVE.

The King is not bound by Statutes of Restraint, except they concern the Commonwealth, or the King be specially named; as the Statute Westminster 2. (Plowd. 240. 5 Co. 14. b. 1 Co. 44. b. 48. a. 7 Co. 21. a. 32. a. 11 Co. 72. a. 1 Rol. Rep. 153.) which altered the Fee simple conditional into an Estate Tail, so that the Tenant in Tail should not have Power to alien, shall bind the King, for this is for the Good of the Commonwealth. And therefore upon Land given to the King in Tail, a Remainder over, if the King hath Issue, and that Issue alien, and die without Issue, he in the Remainder may enter; but if a Man be attainted by Act of Parliament, (4 Ed. 4. 241. Bro. Entre. Cong. 134.) and his Lands forfeited, with a Proviso, that of such Lands whereof he was seized to the Use of another, Cestuy que Use might enter, yet the King is not bound by this, that is to say, Cestuy que Use may not enter upon him, for it is not made for the Public Good. But the Statute 1 H. 5. (Plowd. 210.) That in Indictments Addition shall be given to the Party indicted, shall bind the King, because Indictments are there specially named.

[22]

¹ 37 Aff. pl. 17. 1 H. 7. 19. Co. Litt. 110. a. Dyer, 375.
^m 21 Ed. 3. 46. Bro. Parlement, 16. ^a 11 H. 7. 11. b. ^o 2 H. 7. 6. Fitz. Grant 33.

with

with a Statute before it is made : Wherefore a License to carry ^p Bell-metal out of the Realm, notwithstanding any Statute made or to be made, is not good, if a Statute be afterwards made to prohibit it ; for he may not dispense with an Act of Parliament before it be made.

CHAP. II.

Of Treason.

[b]

THE Common Law hath ^a two Parts ; the one concerns the Punishment of Offences ; the other Matter of Possessions.

Offences are Things done against the Crown and Dignity of the King.

The Laws which punish them are called Penal Laws.

There are divers Statutes made, by which the Penalty of many of these Offences is increased, sometimes by corporal Pain, sometimes by pecuniary Mulcts, or in other Manner ; and also the Number of Offences is much enlarged : And these are called Penal Statutes : All of which ought to come in amongst the Offences here put, dispersed under their several Heads ; or, considering how many, and very intricate, and perplexed they are, and there is hardly any Part of the Law to which they have not some Respect, I have collected them, viz. (the Effect and Substance of each, with its Penalty) in a Body by themselves.

And because it is proper that every Man should understand them, I have put them in English, to be published hereafter, if there should be Occasion ; for which Cause they are here omitted.

Offences are such as the Law intends and presumes to be done *vi & armis*, or *contra pacem* only.

Offences *vi & armis*, are the criminal Offences of Treason, and Felony, and Trespas ; for in every Indict-

^p Dyer, 52. a.

^a They may be called, Διοργανικὴ καὶ Κτετικὴ.

ment and Inquest of Treason, Murder, Felony, Trespafs, *vi & armis* shall be alledged, or it is not good'.

Treason^a, which is also called High-Treason, or Great Treason, to distinguish it from Petit Treason, is an Offence against the King and his Royal Majesty, as when a Man doth compass or imagine the Death of our Lord the King, our Lady his Companion, or of their eldest Son and Heir: For if a Man intends the Death of the King, and proves it by any overt Matter, as by Words^b, or the like, this is High Treason, because he is the Head of the Commonwealth; but it is not Felony, unless some Act be done; or if a Man violates the Companion of the King, or the eldest Daughter of the King unmarried, or the Companion of the eldest Son and Heir of the King; or if a Man levies War against our Lord the King in his Realm, or be adherent to the Enemies of the said Lord the King in his Realm, giving to them Aid and Comfort in his Realm, by himself, or by others, and be thereof probably attainted by overt Act. [23]

Statutes.

25 Ed. 3. Of Treasons, cap. 2. *Declares the Common Law to be so in the same Words above.*

For Treason a Man^c shall be drawn, hanged, and quartered; viz. ^d the Judgment is, To be remanded to the Place from whence he came, and from thence to be drawn upon a Hurdle unto the Place of Execution, and there to be hanged up by the Neck, and to be cut down alive, and his Entrails and privy Members to be cut from his Body and burnt before his Face, and his Head to be cut off, and his Body divided in four Parts, to be disposed of at the Will of the King.

But a Woman^e shall be drawn, and burnt, not quartered: and this because of the Decency and Comeliness of the Sex.

^a Vide 37. H. 8. c. 8. 4 & 5 Anne, c. 16. Rex v. Wind. 2 Sess. Cases fo. 13. ^b Crimen læsæ Majestatis. V. 25 Ed. 3. c. 2. ^c 13 H. 8. 12. Fineux ^d 1 H. 4. 1. ^e St. Pl. Cor. 182. Fleta, lib. 1. cap. 16. Bac. Cas. of Treason, cap. 2. ^f St. P. C. ibid. Antea. 14. b. Bac. sup.a.

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CHAP. III.

Of Petit Treason.

SUCH is Treason. In Felony * Accessaries before the Fact, viz. those who procure or command another to do the Felony, and also Accessaries after the Fact, viz. those who know of the Felony and voluntarily maintain the Felon, (as if he have received one, who hath escaped for Felony, in his House, and shut up the Door, by which the Country supposes him to be there, and he escapes without being pursued by any: Or if he aid him with Money, but not if he give him good Advice, or speak and write for his Deliverance;) these are guilty of the same Offence.

Felonies are such, for which a Man shall lose Life and Limb; or Felonies of another Nature.

Those for which he shall lose Life and Limb, are Petit Treason; or Felonies for which a Man shall be hanged only.

[b] Petit Treason is the killing of any one to whom private Obedience is due, as his ^b Master, ^c Mistress, altho' she be but the ^d Wife of his Master, his ^e Father, Mother, or if the Wife kill her ^f Husband.

Statutes.

25 Ed. 3. cap. 2. Of Treason. *Declares the Law so.*

For this Offence a Man shall be drawn and hanged, and a Woman, (not only where she murders her Husband, but altho' she be only his ^e Mistress, or the like), shall be burnt.

CHAP. IV.

Of Murder, Homicide, Burglary, Robbery, Larceny.

Felonies, for which a Man shall be hanged only, are such as concern the taking away of Life; or Larceny ^h.

* Plowd. 475. 2 Inst. 183. 3 Inst. 138. 8 Ed. 2. Fitz. corone 427. ^y 26 Ass. pl. 47. 3 Inst. 139. ^b 22 Ass. pl. 49. ^c 12 Ass. pl. 30. ^d 19 H. 6. 47. 3 Inst. 20. ^e Bac. Case of Pet. Treason. 21 Ed. 3. 17. b. 3 Inst. 20. ^f 1 R. 3. 4. 15 Ed. 2. Fitz. corone 383. ^g 12 Ass. pl. 30. Bac. Cas. of Petit Treason. ^h 1 R. 3. 4. 21 Ed. 3. 17. b.

That which concerns the taking away of Life, is Felony of the Death of a Man, or Felonies for which the Life is likely to be in danger.

Felony of the Death of a Man is the killing of a Person *born*ⁱ, altho' it is not baptized; but to kill^k an Infant in *ventre sa mere*, is not Felony.

But if the Party live a Year after the Stroke^l, or Poison given him^m, or the like, it is not Felony.

Felonyⁿ of the Death of a Man, is Murder, or Chance-medley.

Murder, which is of Malice prepense; as if one, of purpose to kill his Wife, give^o her a poisoned Apple, and she after that she hath eat a small Piece of it, gives the Remainder to one of their Infants, which the Husband to avoid Suspicion suffers him to eat, and he die of the Poison, this is Murder, altho' the Wife did not die; for the Poison given of Malice prepense to one, (which by chance procured the Death of another whom he did not intend to kill, nor had any Malice against) shall be as great an Offence, as if it had received the intended Effect, inasmuch as it proceeds from an evil and malicious Intent.

Statutes.

Marlbridge, cap. 25. *Killing by Misfortune shall not be* [24] *adjudged Murder.*

Chance-medley, which commonly hath the Name of Homicide, is that which is done without Malice prepense; ^p as if certain Men assault J. D. to kill him, and J. S. (who hath no Malice against him, but being in the Company, and seeing them fighting) takes part suddenly, and with the others strikes J. D. so that he dies, this is Chance-medley in J. S.

Statutes.

Vide 21 Ed. 1. De Malefactionibus in Parcibus. *It shall not be Felony in a Forester, Parker, or Warrener, to kill Malefactors there, if they will not render themselves.*

ⁱ St. P. C. 21. c. 303. ^k 3 Aff. pl. 2. ^l 3 Ed. 3. Fitz. corone, 303. ^m St. P. C. 21. d. ⁿ St. P. C. 19. ^o Plowd. 474. 9 Co. 81. Bac. Elem. 80. 1 H. H. P. C. 436. 1 Hawk. P. C. 79. ^p Plowd. 100, 101.

But the killing of him who attempts to rob him in the ^a High-way, or in encompassing ^r his House to burn it, tho' he doth not burn it, by which the Owner comes out, and kills any of them, is not Felony.

Statutes.

24 H. 8. cap. 5. *Declares the Law so, and enacts the same.*

Offences for which the Life shall be in danger, are Burglary or Robbery.

Burglary is the breaking and entring of a House in the Night ^s, with a felonious Intent to kill or to steal, altho' that no Man be killed, nor any thing be stolen. And so it is to break a Stable ^r parcell of a House, but not to break his ^u Close to kill him, nor to break his House if it be but to beat him, nor to break his House to kill him, if it be in the Day ^v.

Robbery is the taking any thing from the Person of another by Assault in the High-way ^x. But if nothing ^a be taken, altho' he command him to deliver his Purse, or if money or other thing be taken without ^b putting him in Fear by Assault and Violence, it is no Robbery.

Such are the Felonies which concern the taking away of Life.

Larceny ^c is the secret taking the Goods of another that amount to above the Value of 12 *d.* without Pre-
tence of Right to them; and therefore the Property is not ^d altered by this, as it is in Trespass, so that upon the Appeal of the Party he shall have them again.

[b] Hostlers ^e shall answer for the Goods of their Guests stolen; altho' ^f that the Hostler suffer him to have a Chamber by himself, and deliver to him a Key to keep his Goods. But if the Guest suffer with Good Will a Stranger, with whom he hath no Acquaintance, to lodge with him in his Chamber, and the Stranger steal

^a 26 Aff. pl. 32. ^r 26 Aff. pl. 23. ^s 22 Ed. 3. Fitz. Corone, 264. ^t 22 Aff. 39. 95 ^u 3 Inst. 65. ^v 2 Ed. 6. Bro. Corone, 180. ^w 13 H. 4. 7. b. ^x St. P. C. 30. b. ^y Dr. & Stud. 1. r. c. 8. ^z 3 Inst. 68. ^a 9 Ed. 4. 26. ^b Dyer, 224. pl. 30. ^c V. Stat. Westm. 1. cap 15. ^d 4 H. 7. 5. ^e Dr. & Stud. 1. 2. c. 42. ^f 22 H. 6. 21. b.

any

any thing of him, the Hostler shall not be charged: Otherwise if the Stranger be lodged there by the Hostler.

CHAP. V.

Of Petit-Larceny.

Felonies of another Nature, are Petit-Larceny, or Maihem.

Petit-Larceny is the Stealing of Goods which do not amount † to above the Value of 12 d. For Petit-Larceny * is Felony, so that a Man may justify for this the calling of him a Felon; and the Indictment shall be, *Quod felonice cepit*. For this a Man shall not be put to Death, but shall be corrected according to the Discretion of the Justices.†.

CHAP. VI.

Of Maihem.

Maihem ^a is when any Member is taken away or disabled, whereby a Man is less strong and capable of fighting; as to cut off a Finger ^b of one's Hand; to knock ^c out the Fore-teeth; to put out one's ^d Eye, &c. Otherwise it is to knock out the ^e Grinders, to cut his ^f Ear, ^g Nose, or the like, for these are but Blemishes.

And this is ^h a Felony, whereof a Man shall count, that the Defendant felonice maimed him; and may ⁱ count against some as Principals, and against some as Accessories, against whom nothing ^k shall be done until

† Dr. & Stud. lib. 1. c. 8. Westm. 1. c. 15. 3 Inst. 109. * 27 H. 8. 22. † 41 Ed. 3. Fitz. Corone, 451. ^a Vide the Statute of 22 & 23 Car. 2. cap. 1. Of Maiming. ^b 28 Ed. 3. 94. ^c 8 H. 4. 21. Fitz. Coron. 458. ^d Fleta, l. 1. c. 40. St. P. C. 38 h. ^e Fleta, l. 1. c. 40. ^f Ibid. S. P. C. 38. ^g Vide 22 & 23 Car. 2. c. 1. ^h 6 H. 7. 1. b. 40 Aff. pl. 9. ⁱ 41 Ed. 3. Fitz. Tresp. 199. ^k Stat. Westm. 1. cap. 14. Fleta, l. 1. c. 27. pl. 19.

the Principals are attainted or outlawed; for it is out of the Nature of Trespafs.

Also in ¹ Maihem, in ancient Time, and yet by Render of Law (altho' it is never used) a Man should lose Member for Member; but now, as in Trespafs, he shall only make a Fine to the King.

CHAP. VII.

Of Trespafs with Force.

[25]

SUCH are the Offences of Treason and Felony. In Trespafs with Force, the Party shall ^m make a Fine to the King. And this is the Reason, that an Action of Trespafs ⁿ does not lie now for the Lessee for Years against his Lessor, altho' he distrain without Cause, because the Statute of Marlbridge, cap. 3. saith, That the Lord shall not be punished for the same by Fine and Ransom, which he should be, if he were attainted in this Action.

Prerogative.

And for this Fine he shall be imprisoned until he pay it; for to every Fine ^o Imprisonment is incident, and always when the Judgment is, *Quod Defendens capiatur*, it is as much as to say, *Quod capiatur quousque finem fecerit*. And after Tender of the Fine ^p, the King may not rightfully detain him in Prison.

And therefore where a Man is adjudged to pay a Fine to the King ^q, *Capias pro Fine* lies.

Trespaffes with Force are done to the Person of a Man, or to that which he hath.

Those done to the Person are with Violence, or Pretence of Violence.

With Violence is Rape, or corporal Damage.

Rape is a carnal Abuse of a Woman against her Will. But if the Woman conceive where she is carnally

¹ 18 Ed. 3. 20. Co. Litt. 127. a. Vid. Bac. Elem. iii. and at this Day the Statute of Maiming supra. ^m 19 H. 6. 8. Bro. Fines pur Contempts, 22. ⁿ 5 H. 7. 11. ² Inst. 105. 44 Ed. 3. 20. a. 4 Co. 11. b. 9 Co. 76. a. 10 Ed. 4. 7. a. 11 H. 4. 78. b. 9 H. 7. 4. a. Plowd. 66. ^o 8 Co. 59. b. Co. Litt. 126. b. ^p Bro. Imprison. 100. 11 Co. 43. b. ² Finch, 198. ^q 1 H. 7. 20. abused,

abused, it is no Rape^r, for she may not conceive, except that she consent. And this was not^s Felony at the Common Law, which is proved, in that it is not inquirable in the Leet as a Felony, but as a Trespass.

Statutes.

Vide Westm. 1. cap. 13. *After 40 Days the King shall have the Suit, and the Party shall be imprisoned for two Years, and afterwards shall be ransomed at the Will of the King, and if they have not wherewith, they shall be punished by longer Imprisonment, as the Trespass requireth.*

Vide Westm. 2. cap. 34. *He shall have Judgment of Life and of Member; and altho' the Woman consent afterwards, yet he shall have the like Judgment, viz. at the Suit of the King.*

Vide 6 Rich. 2. cap. 6. *Where a Woman consents to the Ravisher, both are disabled to have any Heritage, Dower, or joint Feoffment after the Death of their Husbands and Ancestors; and the next of Blood of the Woman, and of the Ravisher, to whom the same shall come after the Death of the Woman or the Ravisher, shall have Title to enter immediately, and hold it in hereditary Right.*

[b]

The Husband, (or if she hath no Husband, the next of Blood) shall have the Suit against the Ravishers, of Life and of Member, altho' the Woman consent after: And the Defendant shall not wage Battel.

Corporal Damage is Battery, or False Imprisonment.

Battery is the wrongful beating of one: But if a Man will take my Goods, I may lay my Hands upon him, and hinder him, and if he will not leave them, I may beat him rather than he shall have them^r.

False Imprisonment is a wrongful Restraint of one's Liberty; as the arresting^u a Man against his Will altho' it be in the High-street, and he is never put in Prison or in any House; detaining^v of a Woman against her Will^r after that he hath ravished her. So if a Master imprison^w one without Cause, and deliver the

^r 9 Ed. 4. 26. St. P. C. 24. denied for Law in 1 H. H. P. C. 731. ^s 2 Inst. 181. 1 H. H. P. C. 627. ^t 2 H. H. P. C. 172. ^u 9 Ed. 4. 28. b. ^v 2 Finch's Law, 203. ^w 22 Aff. pl. 85. ^x 43 Ed. 3. 20. ^y 22 Ed. 3. 45. ^z 2 Finch, 202, 203.

Key of the House to a Servant, who hath notice of the wrongful detaining of him, if the Servant doth not set him at liberty, he shall be punished in an Action of False Imprisonment. But if the Imprisonment * be upon a false and feigned Suit, as in suing Execution upon a Statute-merchant when the Money is paid, yet no Action of False Imprisonment lies; for he is imprisoned by Course of Law.

Those with Pretence of Violence, are Assault, or Menaces.

Assault is when one unlawfully sets upon the Person of any Man; as if he offer to beat him, tho' he do not beat him in deed ′; if he strike at him with a Hatchet, or the like, tho' he do not hit him ″.

And to this Head belongs * lying in wait, besetting the Mansion-house of any Person, and not suffering his Servants to come in and go out, &c.

Menaces † are threatening Words to beat any one, or the like, for the Fear of which he loseth his Business; for Menace alone, without other Loss, does not make the Trespass, but both together.

The other Trespasses with Force, are touching his Land or his Goods, being with Pretence of Title. And hereupon by the Trespass the Property of Goods is altered ″; so that in Trespass the Plaintiff may not declare that the Defendant took his Horse at S. and [26] carried it to D. and there killed it against the Peace, &c. for by the wrongful taking, the Property being divested out of the Plaintiff, and vested in the Defendant, it follows that the Defendant could not kill his own Horse against the Peace.

Statutes.

Vide Westm. 2. cap. 34. *For Women carried away with the Goods of their Husbands, the King shall have the Suit.*

* 43 Ed. 3. 33. ′ 40 Ed. 3. 40. 2 Finch, 202. ″ 22 Aff. pl. 60. * Rast. Entr. 610. b. pl. 3. † 18 Ed. 4. 28. 7 Ed. 4. 24. 2 Finch, 201. 2. * Vide Ante 24. a. 27. Aff. pl. 64. 2 Finch, 199.

CHAP. VIII.

Of Trespasses against the Peace.

IN Trespasses against the Peace only, the King shall have an Amercement, viz. a small Sum of Money *.

The Queen, the Wife of the King, shall never be amerced^a, and therefore a Writ by her is good, altho' it hath not the Clause, *si fecerit te securum*, for she shall not be amerced at her own Suit.

The Amercement^b of Peers of the Realm is 100 S. As if in an Action of Trespass against two, for chasing and taking two Does, one Defendant is found not guilty; and the other guilty of taking one Doe only; here the Plaintiff, if he be a Peer of the Realm, shall be amerced 200 S. one hundred S. against him who was found guilty, and the other hundred S. against him who was acquitted of one of the Does.

These Trespasses are Wrongs, or Falshoods.

Wrongs, as where one converts my Goods to his own use: Where the Sheriff suffers one in Execution for Debt to go at large: If the Smith^c prick my Horse (for it is the Duty of every Artificer to do his Art duly and truly as he ought) but not if he takes upon^e him to cure him, (yet that is without Warranty) and when he hath done all he can the Horse dies: If the Goaler, when one is committed to Goal, puts upon him such a Weight of Irons, or otherwise uses him so hardly, that he becomes lame thereby; and the like.

Falshoods, are in Words, or in Action.

In Words, as Slanders maliciously uttered, by which a Man may be drawn in danger of the Law, that is, where he is accused of any heinous Crime, as that he is a Thief^f, perjured^g, or the like, or that

[b]

* 8 Co. 59. b. ^a Bro. Amercem. 53. 18 Ed. 3. 2. F. N. B. 101. Co. Litt. 133. a. 8 Co. 61. b. 1 Rol. Abr. 215. 3 Bulst. 276. 2 Finch 185. ^b 2 Inst. 28. 6 Co. 45. a. 8 Co. 40. a. ^c F. N. B. 93. 21 H. 7. 30. 34 H. 6. 6. 7 H. 6. 5. ^d 48 Ed. 3. 6. 21 H. 6. 10. 46 Ed. 3. 19. F. N. B. 94. ^e Vid. Hale's Notes on F. N. B. ubi supra. ^f 4 Co. 19. b. ^g 3 Inst. 166. 4 Co. 19. a. 2 Finch 186.

he hath offered to give ^c Poison to a Woman to kill an Infant whereof she is enſient (yet this is not Felony) or that J. S. being a Juſtice of Peace ^d covereth and hideth Felonies, for it is againſt his Oath, and the Office of a Juſtice of Peace, and hereof he may be indicted and fined. Or, whereby his Trade and Livelihood is hurt, as to call a ^e Merchant Bankrupt, (for his Credit is his Livelihood) but ſo it is not of a Gentleman; to ſay ^f of an Officer, or a Judge, that he is a corrupt Officer, or Judge, for by this he is ſcandalized in his Office or Function. But in all ſuch Caſes for Words of Paſſion and Anger, as to call him forſworn ^g, if he does not ſay, in ſuch a Court; or to call him a Villain, or a Rogue, or Varlet; nor for Words ſpoken in a Suit in Law ^h, as if he bring a Writ of Forgery of falſe Deeds againſt a great Lord, or any other (although that it be falſe) *ſcandalum magnatum*, or Action on the Caſe does not lie, for they are not ſpoken maliciously. Same Law, if the Party who ſpeaks them can juſtify the Words, for then they are not falſe ⁱ. As where one calls another perjured by Reaſon of Perjury committed by him in the Star-Chamber; but not if he juſtifies upon Indictment ^k, or common Voice or Fame.

In Action, are all other Falſhoods whatſoever; eſpecially Conſpiracy and Deceit.

Conſpiracy, is where many ^l Perſons falſly conſpire ^m to do to him a Wrong, or the like; as to indict one for not arreſting a Felon, who paſſed thro' the Town of M. and for this to Cauſe him to be indicted and amerced in the Leet of R. and F. and to be taken and imprifoned for this Amercement, untill he be thereof acquitted in the Leet; or if Men affirm, and ſay to A. that he hath Right to ſuch Land, and procures him to ſue B. the Tenant of the Land, by which B. is com-

^c 4 Co. 16. b. ^d 4 Co. 16. a. ^e Dyer 72. b. pl. 6.
^f 4 Co. 19. a. 1 Mod. 23. Poph. 177. 1 Vent. 50. ^g 3 Inſt.
 166. ^h Dyer 285. pl. 37. ⁱ 30 H. 8. Bro. Action ſur
 Caſe, 104. ^k Dyer 236. pl. 26. ^l F. N. B. 114. D.
 116. L. ^m The Damage is the ground of the Action; for it
 is no Conſpiracy, if nothing be put into Execution. Vide the Caſe
 of Savill. v. Roberts, 1. Lord Ray. 377. Carth. 416. Vid. 9
 Co. 56.

pelled to sell other Land for Defence of the Suit; or if Men procure one to be indicted for hunting in a Park, by which he is taken and imprisoned, and put to great Expences, untill he hath acquitted himself of the Trespass.

Deceit, is where a Man is damnified by any undue Slight; as if a Manⁿ, without my Privity, purchase a Writ in my Name out of the Chancery, for which I am sued to pay a Fine to the King; or if my Attorney^o, in a Plea of Land pending against me, make Default, by which the Land is lost; or if in a Præcipe quod reddat against many Tenants^p, a Stranger purchases a Protection for one of them, supposing him to be beyond the Sea in the Service of the King, where in Truth he is, and ever was within England, by which the Demandant is delay'd; or if in a Præcipe quod reddat the Sheriff returns^a the Tenant summoned where he was not, by which he loseth the Land; or if one in Play, win Money of another with false Dice; or one who sells any Thing, warrants it to be so, or so, by which the other is deceived. Hereby it appears, [27] that the Warrant^y ought to be Parcel of the Contract, for if it be afterwards^r, or at another Place, or that the Servant^{*} makes the Warranty upon the Sale of the Master's Goods, (which in Law, is the Sale of the Master, and the Warranty of the Servant) this Warranty is void, and a Writ of Deceit lies not thereupon. Also the Warranty shall not extend but to Things in *Esse* at the Time, and not to Things which are to come, as that a Horse will carry you thirty Miles in a Day; nor to Things which may be discovered^s by my five Senses to be otherwise; as that Cloaths which are of a Yellow Colour are Blue; except that the Purchaser be blind: But where they are warranted to be of such a

ⁿ F. N. B. 95. ^o Ibid. 96. V. Bro. Disceit. 41. ^p F. N. B. 97. 20 H. 6. 10. ^a F. N. B. supra. Post 113. b.
 ^r 5 H. 7. 41. b. Then it ought to be in Writing per F. N. B. 98. k. ^{*} 11 Ed. 4. 6. ^s 13 H. 4. 1. Hark f. 11 Ed. 4. 16. Choke But per Thirning cont a, if the Thing be not there present. Vid. 2 Finch. 189.

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length¹, and are not, there a Writ of Deceit lies; for this may not be discerned by View, but by collateral Proof, viz. the Measurement thereof.

C H A P. IX.

Of Offences to the Publick.

BESIDES these Offences, being for the most part between Party and Party, there are divers others to the Damage of the Public; some whereof are one kind of Treason, some are Felonies (all shall be noted in their several Places) others in the Nature of Trespases, and are called Contempts; which Contempts shall be punished, not only by Fine, but sometimes by corporal Pain, sometimes by loss of Member; as shall be said hereafter².

Offences to the Publick, are some against God and Nature; as

Sorcery,

Sodomy,

Heresy;

In all these the Offender shall be burnt; and therefore there is a Writ in the Register, which is called *De Hæretico comburendo*³.

The others are to the Damage of the Commonwealth.

Or, as the Common-Wealth is a Body Politic, which consists of the King as the Head, and of his Subjects as the Members of it, so are these Offenders to be distinguished.

[b] Offences to the King (besides Treason, which was handled before) are,

1. To⁴ acknowledge the Authority of any foreign Potentate, as in pleading Excommunication under the

¹ So if one warrants Wares to be of such a Weight, &c. if found not to be of such Weight, &c. at the Time of the Warranty. 11 Ed. 4. 6. 13 H. 4. 1. ² 8 Co. 60. ³ F. N. B. 269. By the Stat. 29. Car. 2. c. 9. the Writ de Hæretico comburendo is abolished. Laus Deo. Vid. Same Statute, how it is now punished. Sect. 2. ⁴ T. Ed. 1. which Note before any Statute of Præmunire. Per 30 Aff. pl. 19. Bro. Treason 14.

Bull of the Pope, or the like; and this shall be punished as Petit Treason.

2. *To disobey the Commandment of the King* by his Writ under ^b the Great Seal, Privy Seal, or Privy Signet, where-upon (because such Writs are not to draw Things in Plea, or solemn Action, but only to command or prohibit any Thing) no Process lies, but Attachment for not executing, or obeying them; for the Commandment, or Prohibition is in lieu of Summons, and after this the Process is Attachment and Distress. So it is in every Writ, which is upon a Prohibition broken ^c, as *Quare non admisit*, *Quare incumbavit*; for every Breach of a Prohibition is a Contempt in itself, but Attachment lies not, except that a Prohibition, or the like, be first directed to him.

And therefore ^d the Sheriff, or other Officer, who doth not serve the third Writ, whatever Writ it be, is guilty of a Contempt. Therefore upon the first Writ not served, a Man may have another of the same Nature until it be served. The second is called an *alias*, (because it recites, *We command you as we have alias heretofore commanded you, that you take, or summon, or the like, as the first Writ was.*) The third is called *Pluries*, (viz. as many Times we have commanded you, &c.) which hath ever this Clause, (*or signify to us the Cause.*) So may the second Writ, if the Plaintiff will, And upon the third Writ not served, Attachment lies. All the rest are called a *Plus Pluries*. Such Writs, that is to say, which command or prohibit any Thing, (besides those which are dispersed in their proper Places) are,

1. *All certificatory Writs* ^e. As if in a Writ of Right Close brought in ancient Demesne, the Tenant vouches a Foreigner to warranty, and sues his Writ of *Warrantia Chartæ*, returnable in the Common Bench against the Vouchee, and upon this a *superfedeas* issues to the Bailiffs of ancient Demesne, now if the Plea of *Warrantia Chartæ* be determined or discontinued in the

^b F. N. B. 85. a. holds if the Writ be under any of these three Seals. ^c 8 Co. 60. a. F. N. B. 85. c. ^d 2 Ed. 4. 1. ^e F. N. B. 14.

Common Bench, the Demandant in the Writ of Right Close, may sue a Writ out of the Chancery, directed to the Justices of the Common Bench, to certify the King in the Chancery thereupon; so that if it be determined or discontinued, he may command the Bailiffs in ancient Demesne, that they may proceed in the Plea. So ^f upon a *Monstraverunt* sued against the Lord of ancient Demesne, and Attachment thereupon, inasmuch as he shall not be put to answer to the Writ of Attachment before the Court be certified by the Treasurer and Chamberlains of the Exchequer, whether the Manor be ancient Demesne; therefore it be-
 [28]hoveth the Plaintiffs in the *Monstraverunt* to sue a special Writ unto the Treasurer and Chamberlains of the Exchequer, to certify the same. Upon an *Indicavit* ^s purchased in Chancery, surmising that the Tithes in Question do amount unto the fourth Part of the Value of the Church, the other may have the King's Writ directed to the Bishop, to certify the King in the Chancery, of the Value of the Church; to the end, that if the Tithes do not amount to that Value, he may have a Consultation. So upon a Surmise made in Chancery ^h, that the Committee of the King of a Ward hath done Waste, a Writ shall issue to the Escheator, to certify the King thereof; and so in all other like Cases.

2. *Writs of Procedendo*: to proceed in Suits. ¹ As if a Man sue a Writ of Right, directed to the Lord of whom the Lands are holden, and he will not hold his Court to proceed upon this Writ, then the Demandant in the Writ of Right, shall have a Writ directed to the Lord, commanding him to hold his Court, &c. If a Man ^k be essoigned of the King's Service in any Action, when in Truth he is not in the King's Service, then the Plaintiff or Demandant may sue a special Writ out of the Chancery directed unto the Justices, rehearsing that he is not in the King's Service, commanding them to proceed. So where the Justices in any Court delay the Plaintiff or Defendant, and will

^f F. N. B. 16. c. 49 Ed. 3. 22. 39 Ed. 3. 6. 19 Ed. 3. pl. 5.
^g F. N. B. 52. ^h F. N. B. 59. B. ⁱ F. N. B. 3. E.
^k F. N. B. 17. H.

not render Judgment for him, where they ought, the Party grieved shall have a Writ of *Procedendo ad Judicium*¹.

3. *Of Prohibition*: To restrain one that he do not sue in an inferior Court, for a Thing whereof they may not hold Plea^m. As that he shall not sue in Court Christian for a Thing which does not concern Matrimony, nor Testaments, as if it be for Goods or Debt, &c. And although the Plaintiff cannot have Remedy in such a Case at the Common Lawⁿ, as if it be of a Breach of a Covenant without Specialty, or Debt against an Executor upon the Contract of the Testator, or *pro lésione Fidei* against one; who in Wager of Law, in an Action of Debt upon a simple Contract, hath taken a false Oath. So if a Bailiff in a Court Baron^o hold Plea of a Sum above 40 s. the Defendant may have a Prohibition. And such Prohibitions may be directed as well to the Judge himself, that he do not hold Plea in the Cases aforesaid, as to the Sheriff to restrain the Party from suing^p.

4. *Of Supersedeas*; to stay any further Proceedings in a Suit. As if a Man brings a Writ of Trespass *Vi et Armis* in the County Court^q, the Defendant shall sue out of the Chancery a *Supersedeas*; If in a Writ of Right Close brought in ancient Demesne^r, the Demandant and Tenant put themselves upon the Grand-Assize, or the Tenant maketh a Foreign-Voucher, or plead a Foreign-Plea, which may not be tried in the Lord's Court; If a Clerk of the Chancery, or any of his Servants, or the Chancellor, or the Keeper of the Great-Seal, be sued in any other Place whatsoever for a Trespass which they have done; they shall have a *Supersedeas* out of the Chancery to stay the Suit^s. [b]

3. *To disobey the Command of the King by his Proclamation*^a in England.

4. *To disobey any Thing prohibited*^b by any Statute.

¹ F. N. B. 153. b. ^m Old N. B. 30. ⁿ 22. Ed. 4. Fitz. Consultation. 2. Per Catesby. Post. 141. b. ^o 19 H. 6. per Old N. B. 31. ^p F. N. B. 40. ^q F. N. B. 239. D. ^r F. N. B. 13. G. ^s F. N. B. 42. h. ^a F. N. B. 85. c. ^b 8 Co. 60. b.

THE SECOND BOOK

Of Offences against the Body of the Commonwealth, those are the first which do strike at the *Domestic-Safety* thereof, as at the very *Heart* of the Commonwealth.

This Safety doth consist herein, that there be *Peace at home*; against which the Offences are Rebellions, Insurrections, Riots, Routs, and unlawful Assemblies. For ^c Riot, &c. was punished at the Common Law, as Trespass, and the Fine was proportioned to the Quantity of the Offence. The like is to be intended of the others, which follow, viz.

^d *Unlawful Assemblies*; when above the Number of two assemble to do any unlawful Act.

Rout; where they set forward to do it.

Riot; where they do it indeed.

^e *False News*; by which Discord may arise between the King and his Nobles, or People; or between the Lords and Commons.

In the second Place, that there be *Arms abroad*; under which are such Offences, as be against the *Strength* of the Realm, and the Defence of it against Foreign Enemies; and these Offences are done, as it were, in Opposition to the *Hauds* and the *Arms* of the Commonwealth.

The Orator comprehends all under this Class in four Words; Et certe in Armis, militum virtus, locorum opportunitas, classis, commeatus, multum juvant.

Such is the carrying of Victuals, or Armory to the Parts beyond the Sea, in Comfort and Support of the King's Enemies. Also, ^f departing beyond Sea without the License of the King^g, by which the King and the Realm may be infeebled. For every Man is bound

^c Marrow Lect. 8. Per Crompton Just. of Peace, 45. b. Bro. Riots, 5.

^d Fitz. Just. of Peace. 28. Bro. Riot, 4. Vide Stat. 1 Geo. 1. c. 5.

^e Westm. 1. c. 34. Flets, 1. 2. c. 1. pl. 10. Stat. 2 R. 2. c. 5.

^f F. N. B. 85. See several ancient Prohibitions de non tranfretando. Rot. Claus. 10 H. 3. M.

27 Dorso. Claus. 11 H. 3. M. 25. Dorso. Claus. 2 Ed. 3. M. 5. Dorso. Et Nota Claus. 3 Ed. 3. M. 36. Dorso, apponitur Por-

tus de Dover tantum. ^g Vid. Dyer 165. b. and 296. Rot. Claus. 25 Ed. 1. M. 25. Dorso. lib. Parl. 204. 5 R. 2. c. 2. Re-

pealed by 4 Ja. 1. c. 1. Sect. 22.

of common Right to defend the King and the Realm: For which Cause there lie two Writs; the one *Ne eueas regnum*, directed to the Party himself, commanding him, that he goes not into foreign Parts without the License of the King; the other is a Writ *de Securitate inveniendâ quod se non divertat in partes exteras sine licentiâ Regis*. And this shall be directed as a *Supplicavit* to the Justices of the Peace, or to the Sheriff, or to both; and it is to compel a Man to find sufficient Sureties in a Sum of Money, that he shall not go into foreign Parts out of the Realm without the King's License, nor there Attempt any Thing in Contempt or Prejudice of the King, nor to the Detriment of his People, nor shall send any one there upon such Account.

Thirdly, are the Offences which are against the *Justice* of the Realm; whereof *Solomon* speaketh, *Justice raiseth up the Nation*; and the Offences upon this Head, are

1. *Of Judges, who delay or pervert Justice.*

Officers negligent or corrupt, who do not execute [29] their Office as of right they ought; as Keepers of Prisons, who make the Prisoners out of dread of Punishment, to become Approvers^h, and to appeal liege and innocent Subjects for the sake of Gain; or instruct the common People that are in their Custody in theirⁱ Letters, in order to save their Lives, in Disturbance of the Common Law, that Justice may not be done to them, as upon *Lay-Men*, in Deceit of the King, and the like.

Indictors^k, who gives warning to Indictées, and discover the Council of the King, and the Justices.

He, that negligently or voluntarily shall let any one being arrested, (whether he be arrested by himself or by any other) go where he will; which is called an

^h For this was inquirable inter Articulos placitorum Coronæ et Itineris, as appears by Flota, lib. 1. cap. 20. pl. 109. fere Verbatim.

ⁱ This was also an Offence inquirable by the Justices in Eyre, as appears 27 Aff. 44. And Vide Dyer 205. b. S. P. et in Margine Dyer ibid. le Case de J. Vicar Ecclesiæ de la Round-Church in Canterbury. Mich. 7 R. 2. B. R. Rot. 3.

^k 27 Aff. pl. 63. It was taken for Felony; but it seems at this Day, that it is but fineable. 2 H. H. P. C. 161.

^l 9 H. 4. 1. V. 1 Hal. Hist. P. C. 597.

Escape.

Escape. And if the Arrest be for Felony, this voluntary Escape is Felony ^m.

And to this Head, all manner of Extortion of Officers is to be referred ⁿ.

A Juror, who appears and is challenged, and afterwards, when he is found indifferent and demanded to be sworn, he makes Default; he shall be fined to the Value of his Land for a Year ^o.

2. *All Force against the Justice of the Realm*, that is to say, *vis armata*; armed Force; as

Breaking of Prison. Every one, who is under Arrest for Felony, or the like, is in Prison ^p, as well if he be out of Goal as in Goal; so that if he be but in the Stocks in the high Street, or out of the Stocks, in the Possession of any one who hath arrested him, and he maketh an Escape, this is breaking of Prison. If such breaking of the Prison be by the Party himself, this is Felony ^q, whatsoever the Cause be for which he is imprisoned, viz. although it be but for Trespass. This is intended as well of a Rescons made (when the Prisoner is under Arrest, and a Stranger feloniously will take him out of the Possession of him, who had arrested him) as of a breaking of the Prison.

Where Prisoners escape out of the Goal ^r, (as well Clerks attainted as others, Felons that escape out of any other Goal within the Body of the County, or out of the Guard of the Constables of the Towns thro' Negligence of the Guard) this is a breaking of Prison. But if a Goaler, or any other, who holdeth a Prisoner under an Arrest lets him go at large, this is not a breaking of Prison, otherwise, if he escape thro' the Negligence of the Goaler ^s.

[b]

Statutes.

1 Ed. 2. De frangentibus Prisonam. *Breaking of Prison shall not be Felony, except that he be imprisoned for Felony.*

^m 1 Hal. Hist. P.C. 591. 27 Aff. pl. 44. St. Pl. Cor. 31. ⁿ 27 Aff. pl. 44. ^o 36 H. 6. 27. Bro. Contempt. 8. 2. H.H.P.C. 509. ^p 1 Aff. 3 Ed. 3. Fitz. Corone 312. 22 Ed. 3. ibid. 251. St. Pl. Cor. 30. pl. 6. 1 Ed. 3. 17. 2 Inst. 589. ^q 2 Inst. 589. this was the common Law, but altered by Stat. 1 Ed. 2. Vide infra. ^r 27 Aff. pl. 44. ^s St. Pl. Cor. 31. Rescons,

Rescons, viz. when a Stranger, or the Party himself hinders the arresting of a Felon, or the like ^c.

Affrays, the resisting and hindring of Justice; as

Those who come forcibly into the King's Court, in Affray of the Peace, so that the Jurors dare not speak the Truth ^u.

Who encourage and reward Offenders to beat the Officers of the Court, Jurors of Inquest, or any other Men ^v.

To go armed in the King's Palace.

He who strikes a Man ^a in Westminster-Hall, shall lose his Right-hand.

He who strikes a ^b Juror in the Presence of the Justices, shall have the same Punishment, and moreover shall be committed to perpetual Imprisonment.

To kill the Chancellor, Treasurer, or Justice of the one Bench or of the other, Justices in Eyre and Assize, or of Oyer and Terminer, being in their Places doing their Offices, is Treason.

Statutes.

^{*} 25 Ed. 3. Of Treason, declares the Law to be so.

3. *Conventicles*, that is, *vis inermis*, unarmed Force; which comprehends

Conspirators and Confederators, that is to say, those who enter into an Agreement amongst themselves, by Oath, Covenant, or other Alliance, whereby each undertakes to aid and sustain the other, be the Matter true or false; and who falsly cause others to indict or acquit Men, or falsly move others to stir up Suits, notwithstanding that nothing be put in execution ^c.

Those

^{*} St. Pl. Cor. 31. ^u 27 Ass. pl. 44. ^v Ibid. ^a 41 Ed. 3. Fitz. Corone, 280. Jenk. Cent. 43. Post. 75. b. 3 Inst. 218. Bac. Cases of Præmunire. Dyer, 188. pl. 10. & Cases in Marg. 2 Inst. 549. 22 Ed. 3. 13. a. 39 Ass. pl. 1. Bro. Pain. 16. Selden upon Hengham, 6. ^b 19 Ed. 3. Fitz. Judgment, 174. 39 Ass. pl. 1. Bro. Contempt. 9. 41 Ass. 25. Bro. Ibid. 11. ^c It is clear that such False Conspiracy, tho' nothing be put in execution, shall be punished by Indictment at the Suit of the King, and is one of the Articles in the Commission of Oyer and Terminer, as it was adjudged, 9 Co. 56. b. Moor 814. Cro. Ja. 8. But it is as clear, that the Party can have no Action for such a Conspiracy where nothing is done, because not the Danger, but the Damage, is the Ground

Those who receive Men into their Protection, taking of them certain Fees yearly by Gifts or Rents, in the Name of *Chivage*, to maintain them right or wrong; or retain them in their Services and Fees, for destroying the Truth, and to maintain their evil Enterprises^d.

Maintenance^e, when a Man maintains a Suit in Law.

Champerty, when he maintains it to have part of the Thing in Suit.

4. *Offences in favour of Malefactors*; as

Misprisions, viz. the^f Concealment of Treason or Felony, when a Man doth not discover the same to the King or his Counsel, or to any Magistrate. Misprision of Treason^g is punishable by perpetual Imprisonment. For Misprision of Felony, a Man shall be put to a Fine by the Justices before whom he is attainted.

[30] Theftbote^h is not when a Man retakes the Goods which were stolen of him, but it is properly, when a Man receives the Goods of a Thief in order to favour and maintain him. The Punishment is Ransom and Imprisonment, not of Life and Member.

Not assisting the Sheriff, Constable, or other Officerⁱ.

5. *Contempt of Justice*; as

Those who fly for Fear, when Treason or Felony is committed by any, we say such an one *fugam facit*.

Those who, in Case of Felony or Treason, tarry until the Exigent, altho' they then render themselves.

Those who suffer themselves to be outlawed, whether it be in Treason, Felony, or Trespals.

Ground of the Action, and no Action lies for the greatest Conspiracy imaginable, if nothing be done. 1. Lord Raym. 378. and S. P. mentioned in Moor *supra*, and Lucas 220. And so are these Books reconciled with our Author. ^d This was enquirable by the Justices in Eyre, Fleta, l. 1. c. 20. pl. 90. 27 Aff. pl. 44. Co. Litt. 140. a. ^e 27 Aff. pl. 44. Vid. 2 Inst. 208, &c. ^f Vide Stat. 1. & 2. P. & M. cap. 10. ^g 3 H. 7. 10. Bro. Treason 19. 2 Rich. 3. 9. Bro. Ibid. 25, 31. ^h 41 Aff. pl. 5. St. Pl. Cor. 40. 3 Ed. 3. Fitz. Corone 353. 3 Inst. 134. ⁱ 3 H. 7. 1. That this is by the Common Law. And this was inquirable by the Justices in Eyre, as appears by the old Chapters in Eyre in Fleta, lib. 1. cap. 20. pl. 79.

The King may imprison the Body of him who is outlawed until he purchase his Charter of Pardon; and hereupon there is a Writ called *De Utlagato capiendo*^k.

6. *Falsifying of Justice*; as

Counterfeiting the Great Seal or the Privy Seal of the King: And this is Petit-Treason; for so it was by the Common Law as it seems; but vide the Statute 25 Ed. 3.

Statutes.

The 25 Ed. 3. Of Treasons, cap. 2. *makes it High-Treason*^m.

^a Perjury, and Subornation of Perjury.

Forgery^b.

All other Falsity and Deceit in Matter of Justice.

The fourth Kind of Offences, is of those which are against the *flourishing Estate* of the Realm, as against the *Colour* and sanguine *Complexion* thereof.

And these are in divers Manners; as well in Matters of Traffick, buying and selling, and the like, as out of it.

In Matters of Traffick, buying and selling, &c. are,

1. Those which tend to make Commodities more dear; as,

To transport^c the Commodities of the Realm, that is, without the License of the King, and paying him Custom.

^k Old Nat. Brev. 168. ^l 1 Ed. 3. 24. Fitz. Charter. 13. In which Book (obiter) a Person was arraigned for counterfeiting the King's Seal, and pleaded a Charter of Pardon of all Felonies, &c. which was allowed. But this does not prove that counterfeiting the King's Seal was not High-Treason at the Common Law; but the Truth is, that at the Common Law High-Treason was often comprehended under the Name of Felony, and therefore a Pardon of Felonies was often taken to extend to High-Treason. And it appears by Fleta, lib. 1. c. 22. and other Authors that wrote before the 25 Ed. 3. that counterfeiting the King's Seal was High-Treason. And so vide 3 Inst. 15. ^m This Stat. naming the Great Seal and Privy Seal, counterfeiting the Privy Signet, or the Sign manual, was not within this Statute; but by the Stat. 1 Mary, cap. 6. it is made High-Treason in both Cases. ⁿ Vid. 5 Eliz. c. 9. 29 El. cap. 5. & 21 Ja. 1. cap. 28. Vid. Dyer, 288. a. 2 Geo. 2. cap. 25. 9 Geo. 2. cap. 18. ^b Vid. 5 El. cap. 14. 8 Geo. 1. cap. 22. 12 Geo. 1. cap. 32. 2 Geo. 2. cap. 25. 9 Geo. 2. cap. 18. 7 Geo. 2. cap. 22. ^c 27 Ass. pl. 44.

Forestallers^d, Regrators, Engrossers; under which all Monopolies are comprehended.

Conspiracies of Merchants^e, Men of Trade, and the like, who by Alliance amongst themselves from Year to Year, put a certain Price upon Wool, or other Commodities, which they are to sell in the Country, that none of them shall purchase, nor shall suffer any other to purchase Wool or such other Commodities, at above the certain Price which they themselves have fixed, to the great Impoverishment of the People, &c.

- [b] 2. All Falshood and Deceit in such Matters; as Counterfeiting the King's Money^f, or bringing false Money into the Realm resembling the Money of England, knowing such Money to be false; to merchandize or make Payments with the same, which is called Petit-Treason.

Statutes.

^g Vide 25 Ed. 3. of Treasons. cap. 2. *maketh this High-Treason^g.*

Falsh^h Weights and Measures^h.

Those who killⁱ corrupt Meat, and it lies in the Shop to be sold, tho' they sell it not.

3. Usury^k, and Oppression^l.

Out of the Course of Traffick.

1. Things which tend to destroy the Commodities of the Realm, as Depopulation^m of Towns, and the like.

^d 25 Ed. 3. cap. 3. 2 Rich. 2. cap. 2. 27 Ed. 3. cap. 11. Note, that the Penalty of Death in the third Article of 27. Ed. 3. is repealed by 38 Ed. 3. cap. 6. but the Forfeiture of Lands and Goods remains by that Statute. Vid. 5 & 6 Ed. 6. cap. 14. made perpetual by 13 El. cap. 25. And vid. what is repealed thereof and of other Stat. by 5 Eliz. cap. 5. sect 13. Vid. 5 Eliz. cap. 12. ^e 27 Aff. pl. 44. 9 Co. 56. b. ^f Vid. Capitula Corô. & Itin. Fleta lib. 1. c. 20. & cap. 22. 27 Aff. pl. 44. Plowd. 316. Vid. 3 Inst. 16, 17, 18. ^g This is only declaratory of the Common Law, as appears from the ancient Books; and therefore the Book, 3 H. 7. 10. which says it was only Felony before that Statute, is not Law. ^h Vid. Cap. Itin. Fleta lib. 1. cap. 20 pl. 19, 20, 21, 22, 23. 27 Aff. pl. 44. 14 Ed. 3. cap. 12. 25 Ed. 3. cap. 9. 10 27 Ed. 3. cap. 10. 13 Rich. 2. cap. 9. 16 Rich. 2. cap. 3. 8 Hen. 6. cap. 5. 11 Hen. 6. cap. 8. 1 Anne cap. 15. ⁱ 1 Rich. 3. 1. ^k Vid. 37 H. 8. c. 9. 12 Anne c. 16. ^l 27 Aff. pl. 44. ^m Vid. Preamble of 39 El. cap. 1.

Burning ⁿ of Houses, or of Barns adjoining to a House; which Offence is Felony.

Burning of Corn ^o in a Barn, or the like. And this is also Felony.

In the fifth and last Place are those Offences to be ranged, which are ^p against the *safe Passages* and *Travelling* thro' the Country, as it were against the *Feet* and the *Toes* of the Commonwealth; and these Offences are in relation to Bridges, Causeys, High-ways, and Streets, which are broken, and in bad Repair, &c. and to this Head are referable all common Nuisances, Purprestures, &c. Such ^a Nuisances every Man may demolish. And as to Nuisances, there is a Writ ^r in the Register, which lieth for him who will sue, when the Ways or Streets, or the Lanes in any Town or City, or Borough corporate, or the Suburbs thereof, are full of Dung or Ordure, or such Things by which Infection may increase, directed to the Mayor, or such other Officer of the Place, to cause them to be cleaned, and to be kept clean.

Where one is a Lazar ^o or a Leper, and is dwelling in any Town, and will come into public Places, as into the Church, or other Place where the Neighbours are assembled, a Writ *de Leproso amovendo* lieth at the Suit of any one who will sue, to remove him out of the Company of Men to some solitary Place, to dwell there. And this is to the end that a Man should not be infected by him; but if he will keep himself within his house, and will not converse with his Neighbours, then it seems that he shall not be removed out of his House. And it seems also, that this Writ is for [31] those Lepers who appear to the Sight of all Men that they are Lepers, by their Voice, and their Sores, and the Putrefaction of their Flesh, and by the Smell of them; but for those who are infected with that Disease

ⁿ 2 Inst. 147. ³ Inst. 66, 67. St. Pl. Cor. 36. ^o 4 Co. 20. a. St. Pl. Cor. 36. ^p 27 Aff. pl. 44. ^a 33 H. 6. 26. 42 Aff. pl. 5. ^r F. N. B. 185. d. But for Villages in the Country which are not corporate, such Writ doth not lie. Ibid. ^s F. N. B. 234. d. Regist. Orig. 267. Fleta l. 6. c. 40. 2 Inst. 54.

in their Bodies, and it doth not appear outwardly upon their Bodies, *Quare*, Whether such Writ lieth for to remove them?

Lastly, There are some Offences which have relation to the Public, but are of a more trifling Nature, and punishable by Amercement, as where the Plaintiff is nonsuited in an Action; where his Original Writ is abated; where the Sheriff, or such other Officer, makes a bad Return of a Writ; where a Man makes Default, when he ought to appear; and the like.

A Town which suffers a Man that hath killed another there, to escape in the Day-time, that is to say, so long as there is full Day-light, altho' it be at the Evening-tide, for that is accounted parcell of the Day and not of the Night, and altho' that the Person was killed by Misadventure, shall be amerced; for it belongs not to the Town to judge thereof.

CHAP. II*.

[b]

Of Possessions, and Things which generally appertain to them.

Et jam prima mei Pars est exacta Laboris.

For of Offences and their Punishments (the first Part of the Law) we have already spoken: The other remains, which concerns Possessions.

When a Man hath any thing to the Use of another, upon Confidence that the other shall take the Profits, he who shall have the Profits, is said to have a Use. Which Use at the Common Law was accounted nothing but a Matter in Conscience and Chancery only; upon which these Statutes following were made.

* 22 Aff. pl. 32. " 7 H. 6. 36. " 40 Ed. 3. 20. " 10 Ed. 4. & 49 H. 6. 19. Bro. Amercement 46. " 22 Ed. 3. Fitz. Corone 238. 2 Ed. 3. Itin. North. Ibid. 293. 3 Ed. 3. Itin. North. Ibid. 303. 7 Co. 6. b. " 26 H. 8. Bro. Feoffm. Al. Use 52. " Dyer 12. pl. 51. Fitzherbert. Co. Litt. 272. b. Ante, 6. b. Bac. Elem. 150.

Statutes.

Statutes.

1 Rich. 3. cap. 1. *Every Grant of Land itself made by Cesty que Use, and every Execution and Recovery, shall be good against them and their Heirs, all Persons that claim only as Heirs, and all others that claim only to the Use of them or their Heirs.*

4 H. 7. cap. 17. *The Heir of Cesty que Use of Land holden in Chivalry^{*}, shall be in Ward, and shall pay Relief.*

19 H. 7. cap. 15. *Execution shall be sued against Cesty que Use upon a Judgment, Statute, or Recognizance. The Heir of Cesty que Use of Land holden in Socage, shall pay Relief. And the Lord of the Villain who purchases Land in Use, may enter upon him.*

27 H. 8. cap. 10. *When a Man is seized to the Use or Confidence of another, he who shall have the Use or Trust shall have the Land itself in the like Quality, Manner, Form, and Condition, as he had the Use or Trust.*

So where a Man is seized to the Use or Intent that another shall have an annual Rent out of the same Land, he that hath the Use of the Rent shall be deemed in Possession thereof, in the like Estate as he had in the Use.

27 H. 8. cap. 16. *No Freehold, or Estate of Inheritance, nor any Use thereof, shall pass by reason only of any Bargain and Sale, except the Bargain and Sale be by Deed indented and inrolled, within six Months after the Date, in some Court of Record at Westminster, or in the County where the Lands lie.*

To all Possessions this in general doth appertain, that [23*] they admit of wrong and lawful Acts, that is to say, Grants, or collateral Acts; both of which may be upon Condition or Limitation.

Upon Condition, which is voidable upon the doing or not doing of a Thing: As a Lease for Years or for Life, upon Condition that, if the Lessee doth not go to Rome before such a Day, the Lessor or his Heirs may reenter. Therefore here the Grantee of the Reversion may not enter for the Condition broken[†]. Same Law,

^{*} Tenure in Chivalry is abolished by 12 Car. 2. c. 24. [†] Littlet. §. 325.

if a Man by Deed indented infeoffe another in Fee-simple, or make a Gift in Tail, or a Lease for Life or Years, reserving to him and his Heirs an annual Rent payable at a certain Time upon Condition, and if the Rent be behind, &c. that it shall be lawful for him and his Heirs into the same Lands and Tenements to re-enter, &c. In these Cases, if the Rent be not paid at or before the Time limited in the Condition, the Feoffor or his Heirs may enter into such Lands or Tenements, and them have and hold in his first Estate, and thereout wholly oust the Feoffee, Donee, or Lessee, &c. And this is termed a Condition in Deed. So it is in such Estates which have by Law a Condition annexed to them, altho' it be not specified in the Writing.^a As where a Man grants to another by his Deed the Office of Parkership of his Park, to have and occupy the same Office for Term of his Life, the Estate which he hath in the Office is upon a Condition in Law, viz. that he well and truly keep the Park, and do all that which belongs to such Office, otherwise the Grantor and his Heirs may lawfully oust him, and grant it to another. And such a Condition, which is intended by the Law to be annexed to any thing, is as strong as if the Condition was put in Writing. In the same Manner it is of the Grant of a Stewardship, Beadleship, Bailiwick, or other Offices^a.

Upon Limitation; when it is void upon the doing or not doing of it; ^b as a Lease upon Condition that, if the Lessee go not to Rome before such a Day, that his Estate shall cease; and therefore in this Case the Grantee of the Reversion may enter if he do not go, for by this his Estate is determined and void. So if Land be given to Husband and Wife to have during the Coverture,^c or if a Parson of a Church make a Lease for so long as he is Parson, this in both Cases is an Estate for Life upon Limitation^d.

When an Act is done to many Persons, it may be jointly or in other Manner. From whence it comes, that

^a Little. §. 378. ^a Little. §. 379. ^b 11 H. 7. 17. ^c Little. §. 380. ^d *Ibid.* §. 382.

Several Men, having the same Thing by Grant or Purchase, are called Jointenants, or Tenants in common.

Jointenants^e are those who are in by one same Title: As if two, three, or more Persons, are infeoffed of certain Land to hold to them and their Heirs, or for Term of their Lives, or for the Life of another, or if many disseize another to their own Use, or a Lease for Years be made, or a House or other Chattel-personal given to them: And the Survivor^f shall have the whole in the same Plight as he had his Part, except only present Interests of the Thing itself granted by him who died, as a Lease for Years made by a Jointenant, altho' the Lessee never had Possession, or altho' that it was to commence at a Day to come, and the Jointenant who made it dies before the Day,^g it shall bind the Survivor, for the Lessee hath a present Interest. Otherwise it is of a Grant to have a Lease if the[†] Grantee pay 10 *l.* before Midsummer next, and the Jointenant, who makes the Grant, dies before the Day; for there is not any Interest, but a nude Communication until the Money be paid. Also otherwise^{*} it is of a Rent-charge granted out of the Land whereof they are Jointenants, for this is not any Interest in the Land itself.

Tenants in common are by several Titles; † as if there are two Jointenants, and the one alien his Part to another, the Alienee and Jointenant who did not alien are Tenants in common, for the Alienee comes in by the Feoffment of one of the Jointenants. So if there are three Jointenants, ‖ and one alien in Fee that which belongs to him, the Alienee is of this third Part Tenant in common with the other two Jointenants, but they remain Jointenants of the other two Parts. So if Land be given ¶ to two Men, or to two Women, and the Heirs of their two Bodies begotten, the Donees have one joint Estate during their Lives, but their Issues are Tenants in common of the Inheritance, for each claims

^e Littlet. §. 277, 278. ^f Littlet. §. 280. ^g 2 Rol. Abr. 89. Plowd. 263. [†] 14 H. 8. 22. Plowd. 263. Co. Litt. 184, 185. ^{*} Littlet. §. 286, 289. [‡] Littlet. §. 292. [¶] Littlet. §. 294. [‖] Littlet. §. 293. 296.

as Heir of the Body of his Father, and it is impossible that two Men or two Women should have one Heir of their Bodies begotten between them. So if Land be given * to a Mayor and Commonalty and their Successors, and to J. S. for J. S. takes in his own Right, and the others in Right of the Corporation; and this is the Reason, that upon a Feoffment to a Corporation and another Person, there ought to be several Liveries in respect of their several Capacities, which makes them Tenants in common. So if Land be † given to two, *habendum* the one Moiety to one, and the other Moiety to the other. In the same Manner, if a Lease for Years be made to two, or two have an Horse or an Ox, and the one grants that which to him belongs of the Term, the Horse, or the Ox, to another ‡.

Statutes.

Vide Westm. 2. cap. *That Tenant in common shall have a Writ of Waste against his Companion, and upon Recovery the Place wasted shall be assigned to the Defendant* ☞.

Whatsoever Thing doth not lie in Livery of Hand ^h ought to pass by Deed; for the Right of a Thing real or personal may not be given nor released by Paroll; [24*] no more may a Reversion, Rent, Common in gross, or a Villain in gross be granted by Paroll. But a Horse, ⁱ Ox, or such personal Thing, Emblements, and Trees growing upon the Land, may; so may the Wardship ^k of Body or Land. Also a Lease for Life ^l with a Remainder over is good without Deed, for the Remainder passes by the Livery and Seizin.

A Deed ^m is a Writing in Paper or Parchment sealed and delivered; for if a Parchment without writing be delivered as a deed to a Man, yet it is not his Deed, altho' that an Obligation be afterwards wrote upon it;

* Littlet. §. 297. Co. Litt. 190. a. † Co. Litt. 183. b. Dyer 10. pl. 36. Littlet. §. 298. ‡ Littlet. §. 319, 321. ☞ Vide Fleta, lib. 1. cap. 12. pl. 21. ^h Fleta lib. 3. cap. 15. Co. Litt. 9. a. 49. a. 172. a. Dr. & Stud. 1. 1. c. 8. ⁱ Perkins 13. ^k 12 Ed. 3. Fitz. Grant. 59. ^l 22 H. 6. 1. 40 Ed. 3. 10. 10 Ed. 4. 1. 12 Ed. 4. 16. 15 Ed. 4. 18. Littleton §. 60. Co. Litt. 143. a. ^m 2 Co. 5. a.

or if it be a Writing, but not sealed at the Time of the Delivery of it as his Deed, it is only a Scroll, but not his Deed; or if I write ⁿ and seal a Deed, and the Party takes it without my Delivery, I may plead that this is not my Deed. And it always belongs ^o to him to whom the Possession is given thereby. As if I release ^p to two Disseizors, and deliver the Deed to one, the other if he survives shall have the Release; or if the Disseizor release to the Disseizor, ^q and he makes a Feoffment of the Land, the Feoffee shall have the Release; but if a Feoffment be made to two without Deed, and the Evidences which concern the Land are delivered to the one, the other shall not have them; or if I release to my two joint Feoffees, and deliver the Deed to one, the other altho' he survives shall not have it. But if it is read in other Form than in the Writing is contained to a Man not lettered, it is not his Deed altho' that he seal and deliver it'.

This Deed is either an Indenture, or a Deed Poll. ^r Indenture, when the Paper or Parchment is indented: And it is for the most part sealed interchangeably, and the mutual Deed of each Party: But in Law both are but one Deed'; yet the Deed of the Grantor is the Principal, and the other is but a Counterpart. And for this Reason, if the Lessor only seal it, and not the Lessee, yet it is as good as if both have sealed it. And if there be any Variance between the Deeds, it shall be taken as the Deed of the Grantor is, and the other shall be intended only as the Mistake of him who wrote it.

And this Deed makes an Estoppel to the Party, that is to say, bars him to say against any thing contained in the same ^u. As upon a Lease by Indenture or Fine, both Parties are estopped to say that the Lessor had nothing in the Land. So that if the Lessor happens to have the Land afterwards by Purchase or Descent, the Lessee may enter upon him by way of Conclusion, and

ⁿ 9 H. 6. 37. b. ^o 34 H. 6. 1. ^p 1 Co. 2 a. b. ^q 6 H. 7. 3. b. ^r 2 Co. 9. Thoroughgood's Case. ^s Co. Litt. 229. 5 Co. 20. b. ^t 38 H. 6. 35. ^u Littlel. §. 58. Plowd. 434. Post. 59. b.

also the Lessee (by Estoppel) shall be put to pay the Rent.

Sometimes nude Acts without Indenture, for the like, do make an Estoppel; as if the Husband discontinues the Land of the Wife, and takes an Estate back to him and his Wife for their Lives, the Wife is remitted, but the Husband (by the taking of it back) is estopped to say so.

A Deed Poll is when the Paper or Parchment is not indented. And thererore this is the sole Deed of the Grantor.

[b] Grants are such as concern some Interest; be they such whereby any thing passes (which is properly called a Grant), or a Charge.

PREROGATIVE.

Every Grant of the King, made upon Surmise or Suit of the Party, shall be taken most beneficially for the King, and against the Party (5 Co. 56. a. 6 Co. 6. a. 8 Co. 56. a. 11 Co. 11.). So that a Pardon to the Sheriff *ex speciali gratia & mero motu*, of all Misprisions, Offences, Contempts, and Deceits, shall discharge him of an Amercement for returning a *Quarto exactus* where in truth he was outlawed (37 H. 6. 21). But if he himself sue for such Pardon, there shall be express Words; otherwise this shall not aid him. His Grant shall not be taken to two Intents, (viz.) to any other Intent than is expressed in the Grant (1 Co. 52. a. 7 Ed. 4. 30. Bro. Patents, 62. 2 Sid. 81. 142). As the King's Grant of an Office for Life to an Alien is not good, for it may not enture also to make him a Denizen (9 Ed. 4. Fitz. Denizen 1. Bro. Patent, 62. 1. Co. 2. 5. Co. 56. Plowd. 502. 3 Leon. 43). If he grant Land in Fee to A, who is his Villain, this shall not manumise him (1 Co. 52. 5 Co. 56. Plowd. 502. 2 Sid. 81. Goldb. 26.); for the Villainage is a foreign Matter not expressed in the Grant. But the King

Statutes.

32 H. 8. cap. 28. *All Leases by Deed indented for Years or for Life, made by a Person of full Age, having an Estate in Fee, or in Tail in Right of their Churches or Wives, or jointly with their Wives, shall be good.*

This does not extend to Leases, where there is any old Lease, unless the same be surrendered or expired within a Year after the making of the new Lease; nor to Grants of any Reversion; nor where the Land hath not been most commonly occupied by Farmers for twenty Years next before; nor to a Lease without Impeachment of Waste; nor to a Lease above twenty one Years, or three Lives from the Day of making.

The accustomed Rent for twenty one Years before shall be reserved payable to the Lessors, their

their Heirs, and Successors, who shall have the Reversion; and these in respect of their Estate shall have the same Remedy, as the Lessors.

A Wife, where the Inheritance is her's, shall be a Party to the Lease, and the Rent shall be reserved to her Heirs.

1 Eliz. not printed. Rastall. Leases 4. All Grants, Feoffments, Fines, and other Conveyances and Estates by Archbishops or Bishops to any one (but to the King) other than Leases for twenty one Years or three Lives whereupon the accustomed Rent shall be reserved payable yearly, shall be void.

1 Ja. 1. cap. 3. All Assurances, Gifts, Grants, Leases, Charges, and Conveyances, by any Archbishop or Bishop to the King, of any Land parcell of the Possessions of their Bishoprick, and every Confirmation thereof shall be void.

13 Eliz. cap. 10. All Leases, Gifts, Grants, Feoffments, Conveyances, or Estates, by any Master and Fellows of any College, Dean and Chapter, Governor of any Hospital, Parson, Vicar, or any other having ecclesiastical Living, other than for twenty one Years or three Lives from the Time, &c. and whereupon the accustomed Rent shall be reserved payable yearly, shall be void.

*14 Eliz. cap. 11. continued
1 Ja. 1. cap. 25. The Statute of 13 Eliz. cap. 10. shall not extend to any House situate in any City, Borough,*

King may create a Duke (Bro. Patents, 4.), and in the same Patent grant to him Land by that Name; or make a Mayor and Commonalty, and by the same Patent give them Lands, or grant them License to purchase, for these are several Things expressed in the Grant. His Grant is not good, when it appears in the Body of the Grant, that the King is deceived (1 H. 7. 13. 4 Co. 35. Co. Litt. 27. a. 1 Mod. 196.) as a Gift of Land to one and his Heirs Male (18 H. 8. Bro. Patents, 104. Co. Litt. supra. Gouldsb. 20. 1 Co. 43. b. Hob. 224. Moor 416. 2 And. 156. 1 Rol. Abr. 860. 1 Bulst. 10. 222. Plowd. 335.); for this is a Fee Simple, where it appears that the King intended to grant but an Estate Tail (18 Aff. pl. 5. Thorpe. Bro. Estates, 33).

He may except out of his Grant Things incident, as Courts and Perquisites of Courts, upon a Grant of the Manor (Dyer, 288.)

He may grant over a Condition (2 H. 7. 8. Bro. Prerog. 101. Gouldsb. 19) or reserve Rent to a Stranger (35 H. 6. 36. Fitz. Prerog. 5. Co. Litt. 143. b.

He may give Lands in Fee, upon condition that the Donee shall not alien (21 H. 7. 8. 5 Co. 16 a. Bro. Prerog. 102. 21 H. 7. 7. Per Vavafor. Ib. 38).

Statutes.

Prerogativa Regis, cap. 15. By the Grant of a Manor with the appurtenances, Knight's Fees, Advowsons, and Dower, do not pass in the Case of the King, without express mention.

1 H. 4. cap. 6. Express mention shall be in the Petition of the Value of the Thing demanded, otherwise the Patent shall be void.

2 H. 4. cap. 2. The Statute of 1 H. 4. cap. 6. shall not extend to Things under the Value of £100, except Wards and Marriages.

6 H. 8. c. 15. Where the King grants Lands or Office durante beneplacito, and afterwards grants the same to another without mentioning the 1st, the 2d Grant shall be void.

31 H. 8. cap. 21. All Letters Patent of Henry 8. after the 4th of February, Anno 27 H. 8. until seven Years after this Act shall be good notwithstanding Misnomer,

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mer, Mis-recital, Non-recital, no Office before, or the like. Vide the Statute.

1 Ed. 6. cap. 8. All Letters Patent of Edw. 6. after 18 January, Anno 1 Ed. 6. during his Life, shall be good, notwithstanding the Causes aforesaid.

7 Ed. 6. cap. 3. All Patents after 4 February, 27 H. 8. until the Death of Edw. 6. shall be good, notwithstanding the loss of the Bill assigned for the Patentee, or notwithstanding that there was not any Bill assigned. But this does not extend to any Lease upon which the ancient Rent is not reserved, and payable Yearly. Vide the Statute.

All Patents made by H. 8. or Ed. 6. are good, although the Tenure be in Socage only, and not in Capite, and although there be not any Reservation of Ten or Rents, no withstanding any other Statute.

4 & 5 P. & M. c. 1. All Estates made to Queen Mary, or by her, notwithstanding Mis-number, &c. shall be good.

8 Eliz. c. 2. All Estates made to the Queen, or to be made for seven Years after the End of this Session, shall be good, according to the intent of the same. So of all Estates made, or to be made by the Queen for seven Years of any Thing (except Offices) shall be good, and taken most beneficially for the Patentees, according to the Words and Purport of the Letters Patent, notwithstanding any Misnumber, Mis-recital, or Non-recital of any Thing, or any other Defect.

43 Eliz. c. 1. The like Confirmation of all Estates made to the Queen, after 8 February 25 Eliz. or by the Queen after that Time, or within a Year after the end of this Session.

35 Eliz. cap. 3. All Abbey Lands, which after 4 February, 27 H. 8. come to the Possession of H. 8. or were put in Charge by him in any Court, or by any Officer, or that after the said 4 February were granted, or mentioned to be granted by his Letters Patent to any one, shall be adjudged to have been lawfully and perfectly in his actual Possession at the Time.

All Letters Patent of H. 8. made

Borough, Town Corporate, or Market Town, or within the Suburbs, nor to Land appertaining thereunto: So that it is not the Capital, or Dwelling-House used for the Habitation of any such Persons, nor hath more than ten Acres of Land belonging thereunto.

But no Lease shall be made in Reversion, nor without reserving the accustomed yearly Rent, nor without charging the Lessees with Reparations, nor for more than forty Years.

Also no Alienation shall be of such House, except that presently after such Alienation, there be a Repurchase of other Lands to them and their Successors, of as good Value.

18 Eliz. cap. 11. All Leases (by the Persons in 13 Eliz. cap. 10.) where a former Lease for Years is in Esse, and not to be surrendered or expired within three Years, shall be void.

Every Bond or Covenant for renewing or making of any Lease contrary to the intent of this Statute or of 13 Eliz. shall be void.

13 Eliz. cap. 20. continued, 1 Jac. 1. cap. 25. No Lease of a Benefice, or Ecclesiastical Promotion with Cure, or any part thereof, not impropriated, shall be good for a longer Time than the Lessor shall be ordinarily Resident, and serving the Cure of such Benefice, without Absence above fourscore Days in any one Year, but shall cease immediately

[b]

ly upon Absence. And the Profits of the Benefice for a Year shall be distributed among the Poor of the Parish by the Ordinary.

Also all Chargings of such Benefice shall be void, other than the Rent reserved upon such Lease.

He, who hath two Benefices, may demise one to his Curate only, but it shall not endure longer than the Curate shall be Resident, without Absence above forty Days in any one Year.

14 Eliz. c. 11. continued, 1 Jac. 1. c. 25. All Bonds, Contracts, Promises and Covenants, to permit one to enjoy a Benefice, or Ecclesiastical Promotion with Cure, or the Profits thereof, shall be of the same force, and no other than Leases made by them.

A Lease, Bond, Promise, and Covenant of and concerning Benefices, &c. made by any Curate, shall be of no other force, than if it were made by the beneficed Person himself.

43 Eliz. cap. 9. continued, 1 Jac. 1. cap. 25. All Judgments to the intent to enjoy such Lease, contrary to the 13 Eliz. cap. 20. shall be void.

18 Eliz. cap. 11. The Ordinary within two Months after Sentence given (upon any Offence committed by an Incumbent contrary to the 13 Eliz. cap. 20. by which he is to lose one Year's Profits of his Benefice) and Request by any of the Church Wardens, shall grant the Sequestration of those Profits to what Inhabitant of the Parish he will: Which if he doth not, then every Parishioner may retain his Tithe, and the Church-Wardens may enter and take the Profits of the Glebe, and Rent, and other Duties, to be employed to the Use of the Poor, until Sequestration be committed: And then the Church-Wardens and Parishioners shall make their Accounts, and shall pay the Duties to the Committee. And the Committee shall bestow the Profits to the Use expressed in the Statute, 13 Eliz. c. 20. upon Pain of Forfeiture of the double Value of that which shall be with-holden,

made after the said 4 February, for the Foundation, or Endowment of any Dean and Chapter or College, shall be adjudged good, according to the Intent thereof.

Vide 8 H. 8. cap. 16. Letters Patent by which Land seized into the King's Hands by Inquest, taken before the Escheator or Commissioner, is let to Farm by any Officer of the King until the Inquest returned, and a Month after, shall be void, except that it be to him, who tenders a Traverse.

Vide 18 H. 6. cap. 6. Agrees as to Letters Patent made before the Title of the King, found by Inquisition (if the Title of the King be not found by Record.)

to be recovered by the Poor of the Parish in the Ecclesiastical Court.

Vide 50 Ed. 3. c. 6. *A Man indebted for Merchandize, or Money borrowed, makes a Gift of his Tenements and Chattels to defraud the Creditors, and takes the Profits of them, and flies to St. Martins, or other privileged Place; upon this Collusion found, the Tenements and Goods shall be taken in Execution, as if no such Gift had been made.*

Vide 2 Rich. 2. Stat. 2. cap. 3. *If any Man indebted by any Manner or Means, makes such a Gift to delay their Creditors of their Debt, and afterwards flies to privileged Places of the Church, living there upon the Profits of the Things so given, he may be impleaded, and by two Capias's, whereof the second shall have five Proclamations by five Weeks, at the Gate of the Sanctuary, and if he shall make Default, Judgment shall be given for the Plaintiff and Execution, as if no such Gift had been made.*

[b]

Vide 3 H. 7. cap. 4. *All Gifts of Goods and Chattels made upon Trust to the Use of him who made them, shall be void.*

Vide 13 Eliz. cap. 5. made perpetual, 29 Eliz. cap. 5. *Every Conveyance of Land, or Goods, or any Profit out of the same, and every Obligation, &c. made to defraud a Man of his Debt, Action, or the like, shall be void against him.*

Vide 27 Eliz. cap. 4. made perpetual, 39 Eliz. cap. 18. *Every Conveyance of Land, or Charge out of the same to defraud Purchasers, shall be void against them: So that it be with a Clause of Revocation, and it be sold for valuable Consideration, the Conveyance being unrevoked.*

Vide 13 Eliz. cap. 10. *He who hath a Gift of Goods, or Chattels of any Ecclesiastical Person, made to the Intent to defraud, Dilapidations shall be charged by the Successor in the Ecclesiastical Court, as if he had been Executor or Administrator to him, who so gave the same.*

Prerogative.

All Grants of the King, Licenses, Pardons, or the like, that do pass under the Great Seal by his Letters-Patent,

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Patent, (so called, because they are open, not sealed up, as Writs are) bear Teste the King himself^m.

And these being the highest Matters of Record, they need not any Livery, nor in Pleading them, is it necessary to shew, when they were deliveredⁿ, otherwise, it is in Deeds. Also Things shall pass by them without Attornment, and without Livery of Seizin, and such other Ceremonies. They take Effect from the Time of the Date.

Statutes.

Vide 18 H. 6. cap. 1. *That Letters-Patent, which* [27*] *bear Date before the Day of the Delivery of the Warrant to the Chancellor, shall be void.*

3 Edw. 6. cap. 4. *He who hath Interest in Land or Office under Letters-Patent, (made after the 4 February 27 H. 8.) shall make his Title, Avowry, Plea, &c. by an Exemplification, or Constat, under the Great Seal.*

13 Eliz. cap. 6. *So it shall be done by all Patentees of H. 8. Edw. 6. Queen Mary, Ph. & Ma. and Queen Elizabeth.*

The Custody of this Seal, is with the Lord Chancellor^o.

Statutes.

5 Eliz. cap. 18. *Enacts and declares the Law to be, that the Keeper of the Great Seal, hath the same Authority, &c. that the Lord Chancellor ought to have.*

In such Grants, Licenses, &c. a Writ shall first Issue to the Escheator, to enquire if the Grant, License, &c. be to the Prejudice of the King, the Country, or any other, or not; which Writ is called a Writ of *Ad quod Damnum*^p.

Statutes.

27 Edw. 1. De Libertatibus perquirendis. *See there in what manner Persons who will purchase Lands in Mortmain, or holden in Chief, Fairs, Markets, or other Things, shall sue this Writ.*

Unto this Place do appertain Exchanges, which are mutual Grants of equal Interests, the one in Exchange for the other^q. As of Land in Fee Simple, for other

^m Plowd. 213.
556.

^p F. N. B. 221. q.

ⁿ 37 H. 6. 21. b.

^o 2 Inst. 554.

^q Littlet. 64. 65. Perk. 55.

Land

Land of like Estate ;—but an Estate for Life of another shall not be exchanged with an Estate for Life ; for altho' that both are a Freehold, yet an Estate for the Life of another, is not so large a Freehold as an Estate for one's own Life. And in every Exchange there are two Grants, for each grants to the other his Land in Exchange. And the Word ' (Exchange) is necessary, for if I grant to a Man an Acre of Land by Deed-indented, and he by the same Deed grant to me another Acre for that Acre, nothing passes without Livery, except it have the Word Exchange.

A Chose in Action, as Cause of Suit ; Right of Entry, or Title for Condition broken, or the like, may not be transferred ; so that no Stranger, that is to say, who is not Party, or Privy, either in Blood (as the Heir of the Feoffor) or in Succession (as the Successor of Mayor and Commonalty, &c.) or as Executor, Administrator, or the like, who represents the Person of the Testator, shall take Advantage thereof *.

Statutes.

[b]

32 H. 8. cap. 34. *All Patentees and Grantees of a Reversion, shall have Advantage of every Condition, Covenant, or other Agreement against Tenants for Life, or Years, who have their Leases by Indenture ; so the Lessees shall have the same Advantage against Grantees of a Reversion, or of any Parcel of a Reversion, except Recovery in Value upon Voucher, or otherwise.*

But those Things pass only ' by Release or Confirmation, (for a Release or Confirmation", to him who hath nothing in the Land, is void.)

A Release is when he discharges his Interest. The Form is, I have remised, released, and for me and my Heirs quiet claimed".

Confirmation is, when he ratifies the Possession of another. The Form is, I have ratified, approved and confirmed to C. of D. the State and Possession, &c *.

* 9 Ed. 4. 21.

which declares the Common Law so. 5 Co. 24. 6. Dyer, 283. pl. 19.

* 1 H. 6. 4.

Co. Litt. 265. b.

* Vid. Preamble of 32 H. 8. cap. 34.

5 Co. 24. 6. Dyer, 283.

" Dr. & Stud. l. 1. c. 8.

" Litt. §. 445. Litt. §. 515.

Such

Such are Grants, properly so called. A Charge is when a Man binds himself to any Thing executory and to be done.

Collateral Acts are such as do not concern any Interest, and therefore they may be countermanded, as hath been spoken in the first Book. Of this sort are,

A License to a Man to do a Thing for his own private Advantage: As to hunt in my Park, &c.

An Authority given to do a Thing for him who gave the Authority, as a Letter of Attorney to deliver Seizin, and the like.

CHAP. III*.

Of Hereditaments, and therein of Estates.

Possessions, are Hereditaments or Chattels.

Hereditaments, in which a Man hath an Estate of Inheritance, or for Life.

They may be appendant one to another: Things^a incorporeal to corporeal, as a Way, a Court, Piscary, to a Manor, Land, or House; or^b corporeal to incorporeal, as Land to an Office. But Land^c may not be appurtenant to an House, in the true and proper Nature of an Appurtenance. And every Appendancy^d is to a Thing of the same Nature. For common of Tur-^[28*] bary^e may not be appurtenant to Land, but to a House, because that Turves are to be spent in an House. Nor shall a Lect^f be appendant to a Church or Chapel, because they are of several Natures. And if an Advowson^g, or the like, be appendant to a Manor, this Appendancy is not to the Services, but to the De-

^a Plowd. 170. Co. Litt. 121. b. ^b 4 Co. 37. 2.
¹ H. 7. 28. Bro. Incid. 13. Dyer, 78. pl. 43. ¹ Rol. Abr. 230.
^c Bro. Feoffments, 53. Plowd. 85. 170. 168.
 This, a Principle of Law, as Montague said. ^d 4 Co. 37.
^a S. P. Co. Litt. 121. b. ^e 5 Aff. 9. Bro. Com-
 mission 36. 4 Co. 37. 2. Co. Litt. 121. b. ^f 10 Ed. 3.
⁵ 37 H. 6. 34. 26 H. 8. 4. Co. Litt. 121. b. Fitz. Leet. 8.
 Bro. Incident, 29. ^g Dyer, 70. pl. 41. ¹ Rol. Abr. 230.
 Co. Litt. 122. Cro. El. 210. ¹ Leon. 208.

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mesnes only. For every Appendancy is to such Thing as hath perpetual Continuance ^h.

For the Direction of Hereditaments, there are divers Anomalies, that is to say, special Exceptions varying from the general Rules, and are named Maxims.

Inheritance is an Estate which shall descend (for an Inheritance may not lineally ascend ⁱ, that is to say, from the Son (who purchases in Fee-Simple, and dies without Issue) to the Father, but ever does descend, as to the Uncle, Brother, &c.) to his Heir, that is, to him who is the next of the whole ^k Blood (for the half Blood shall not inherit) and of the more worthy ^l Blood; as the Blood of the Part of the Father, is more worthy than the Blood of the Part of the Mother, the eldest Brother more worthy than the others; and therefore they shall first inherit. But none is of any good Blood, except that he be born in Matrimony. For if a Man marries ⁿ a Woman, by whom he had Issue before, such Issue, although it be a *Mulier*, that is to say, Legitimate by the Law of Holy-Church, yet it is a Bastard by our Law.

Statutes.

Merton, cap. 9. *The Earls and Barons, being required by the Bishops to assent, that those who were born before Espowfels, should be legitimated and inheritable, because the Church accounts them Legitimate; answered, that they would not change the Law of England, used and approved.*

1. *Maxim.* This Descent is to be intended to the Heir of him who was last actually seized ^o. So that, the Possession of the Brother makes the Sister to be Heir, that is to say, that the Sister of the whole Blood, where the eldest Brother hath entred after the Death of the Father, and not the Brother of the half Blood, nor any other collateral Cousin, shall inherit, and yet

^h 21 H. 7. 15. a. Dyer, ibid. Co. Litt. 122. ⁱ Littleton, §. 3. Dr. & Stud. l. 1. c. 7. Glanvill, 44. 3 Co. 40. b.
^k Littleton, §. 2. 6. ^l Ibid. 4. ⁿ Post. 143. 47 Ed. 3.
 14. b. 11 H. 4. 84. 18 Ed. 4. 30. 39 Ed. 3. 31. b. 38 Aff.
 pl. 24. 1 Rol. Abr. 357. pl. 5. ^o Littleton, §. 8.

such Brother of the half Blood, &c. is Heir to the common Ancestor. And if a Man, who purchases Land, dies without Issue, so that this descends, and is at once attached in the Heir of the Part of the Father, the Heir of the Part of the Mother, may never have it, because they are not of the Blood of him who was last seized^p.

2. *Maxim.* He, who shall be Heir, ought to be of the Blood of the first Purchaser. And therefore Land descends, it shall go only to the Heir on that side from which the Land descends; as if it descends from the Father, who purchased it, then it shall go to the Heirs of the Part of the Mother of the same Father; but not to the Heirs of the Part of the Mother of the Son, for although that they are of the Blood of the Son who was last seized, yet they are not of the Blood of the Father who was the first Purchaser^q.

If the Heirs are Females in equal Distance, as [b] Daughters, Sisters, Aunts, &c. they shall equally inherit, and are but as one Heir, and are called Par-teners^r.

Here the Entry of one, is the Entry of the others, if they will. But so it is not of a special Entry to one's own Use^s. As if Tenant in Tail hath Issue two Daughters, and the eldest enter into the whole, and thereof makes a Feoffment with Warranty, this is a collateral Warranty, and bars the younger for her Moiety; which proves that this special Entry, is not the Entry of both, for then it should make a Warranty which commences by Disseizin, and no Bar: But all this is to be intended, where the other Coparcener will have this Entry for her, and not otherwise. And therefore, in a *Partitione facienda* of Rent, it is a good Plea for the Defendant to say, that he is sole seized, without that that he holdeth *pro indiviso*: And the Plaintiff is put to a *Nuper obiit*^t. Also if one enters, both may not be vouched as Heirs, for this is to their Disadvantage, but both may have Affize^u.

^p 49 Ed. 3. 12.

^r Littlel. §. 241.

^s 43 Ed. 3. 19.

^q 12 Ed. 4. 14. Co. Litt. 12. a.

^t Littlel. §. 710.

^u 4 H. 7. 9. b.

THE SECOND BOOK

That which descends^w, shall be charged by the Deed of the same Ancestor, be it Annuity, Warranty, Obligation, Covenant, or the like, but not by any nude Matter in Deed, as where the Ancestors Time whereof, &c. have used to pay an Annuity; but here the Ancestor must bind himself and his Heirs: For if a Man bind his Heirs to pay £20 *per Ann.* or the like, but^x bind not himself, or bind^a himself without naming his Heirs, there the Heir shall not be charged, altho' he hath assets by Descent. And for this Cause, inasmuch as the Heir^e is charged only by Reason of Assets, when he hath Assets the Debt is accounted his own Debt, and Action lies against him in the *Debet & Detinet*, not in the *Detinet* only. And for an Acre^f descending, the Heir shall be charged in an Obligation of £1000, but no other Land shall be put in Execution, but that Acre only. So, altho' it be a Reversion that descends; in which Case^z, the Judgment shall be, that he recover the Debt to be levied on the aforesaid Reversion, when it shall happen, and a special Writ shall issue to extend the whole.

Inheritance is *Fee-Simple Absolute*, or *Fee-Simple Conditional*.

Absolute, which descends to his Heirs whatsoever, so that they be of the Blood of the first Purchaser, as is aforesaid^h.

Conditional, which is to him and to the Heirs of his Body only, for this was a Fee-Simple at the Common Law, but the having of Issue made it a more perfect Fee-Simple than before^{*}.

This, ⁱbefore Issue had, might not be aliened to the Prejudice of the Donor; but such Alienation should be a Bar to the Issue, because he claimed the Fee-Simple by him. After Issue^k he had an Absolute-

^w 10 Ed. 4. 10.

^x 31 Ed. 1. Fitz. Grants, 85.

^a 2 H. 4. 13. Bro. Annuity 13. Plowd. 457. Co. Litt. 144. b.

^e Plowd. 441. 5 Co. 36. a. Post. 108. b. ^f 40 Ed. 3. 15.

^z Dyer, 373. pl. 14. ^h Plowd. 235. Co. Littlet. 1. b.

^{*} Plowd. 250. Co. Littlet. 19. a. ⁱ 2 Inst. 333. 19 E.

² Fitz. Formedon, 61. Temp. Ed. 1. Ibid. 62. Co. Littlet.

19. a. 30 Ed. 1. Fitz. Formedon 65. ^k 7 Co. 35. a.

Co. Litt. 19. a. 2 Inst. 333.

Fee,

Fee, and it might be aliened, or forfeited by Attainder [29*] of Treason or Felony, but so, that it should revert to the Donor, if Issue failed before Alienation made. And this by the Statute Westm. 2. cap. 1. being restrained, that it should not be aliened to the Prejudice of the Issue, and this in such sort, that by the very Words of the Statute a Reversion depends upon it, is now become, by the Construction of the said Statute, a new Estate¹ divided out of the Fee Simple, and is called an Estate Tail.

Statutes.

Westminster 2. cap. 1. *The Will of the Donor, according to the Form in the Deed of Gift expressed, shall be observed, so that the Donee shall not have Power to alien, but that it shall remain to the Issue, or shall revert to the Donor or his Heirs, if such Issue fail.*

1. *Maxim.* † Land given in Frank-Marriage with any Woman his Cousin, is a Fee Simple Conditional; for the Word Frank-Marriage implies an Inheritance to the Donees, and the Heirs of their Bodies begotten; but Land^m may not be given in Frank-Marriage with a Man who is Cousin to the Donor, but always with a Woman.

2. *Maxim.* Such Donee^a shall have nothing of the same Ancestor by Descent, except that she will allow the Value thereof to her Coparcener, which is called, putting in *Hotchpot*; as if ten^o Acres were given to her in Frank-Marriage, and twenty Acres more (all of equal Value) descend from the same Giver, if she will put all together, so that the Value may be known, she shall retain the ten Acres of her own, and shall have five Acres more. But if Lands^p descend from the Father, or other Ancestor of the Giver, and not from the Giver himself, there she shall have her Part of that which descends without putting in *Hotchpot*, for she is not advanced by him, but by another. Also

¹ 2 Inst. 335.

† Littleton, §. 17.

^m Temp. H.

8. Bro. Frank-Marriage, 10. but it seems otherwise. Vid. 6 Ed.

3. 23. Piers de Saltmarsh's Case, F. N. B. 172. h. 7 Ed. 4.

12. Per Moile. Co. Litt. 21. b.

^a Litt. §. 267, 269.

^o Ibid, 268.

^p Litt. §. 272.

Hotchpot shall not be but of Lands^a given in Frank-Marriage, for if Lands be given to a Woman otherwise than in Frank-Marriage, she shall have her Part of that which descends, as if no such Gift had been made. And the Reason of all this is^r, because (if she will not put the Land in *Hotchpot*) the Law intends that she holdeth herself sufficiently advanced. And Note, that (upon the *Hotchpot*) the Land given in Frank Marriage, always shall remain to the Donee^s.

Such is an Inheritance. Now follows an Estate for Life. An immediate Estate for Life is called a Freehold; a Freehold in Deed is, when he is actually seized; a Freehold in Law is before Entry, when it is cast upon him by Course of Law, either after the Death of him who hath the Inheritance, or after the Death of Tenant for Life.

[b] This being but a particular Estate derived out of an Inheritance, a Remainder or Reversion may depend upon it: For a Remainder^a may not be but upon a particular Estate precedent, as upon a Lease for Years, or Life, upon an Estate to one and his Heirs^b, during the Life of J. S. for this in effect is but an Estate for Life^{*}; but it may not depend upon an Estate^c to one and his Heirs, so long as J. S. hath Heirs of his Body, for this is a Fee Simple determinable, nor (at the Common Law) upon an Estate to one and the Heirs of his Body, for this was a Fee Simple Conditional, nor could any Reversion be upon it.

A^d Remainder is a Residue of an Estate at the same time appointed over; and for this Reason^e it may not be said to be by Assignment, but by Demise of the Lessor, because it passes at the same time with the particular Estate.

A Reversion is a Residue of an Estate, not at the same time appointed over; as if a Man demise Land for Life, without saying more, the Reversion of the

^a Littlet. §. 275.

^a Plowd. 83, 35.

239. a.

Post. 46. b.

Noy's Max. 123.

^r Littlet. §. 269.

^b 11 H. 4. 42.

^c Plowd. 29. Vide Vaugh. 269.

^d Plowd. 25. Co. Litt. 49. a.

^e 38 H. 6. 30.

^s Ibidem.

^{*} Co. Littlet.

Co. Litt. 18. a.

143. 4.

Fee Simple is in the Lessor, and if he afterwards grant this to another, the Grantee hath the Reversion.

Also this may be surrendered to him who hath the next and higher Estate^f: As two Jointenants, and to the Heirs of one, he who hath the Freehold may not surrender to the other, for both have a joint Possession, and the same Estate. But Tenants in common may^g, as the Alienee of him who hath the Freehold in the Case before, may surrender to the other; Tenant for Life, where there is a Remainder for Life, with a Remainder over in Fee, may not surrender to him in the Remainder in Fee, for he hath not the next immediate Estate: Lessee for Life^h, may not surrender to him in Remainder for Years, but to him in Remainder for Life he may; for this Remainder (as to him who hath the Remainder) is a more high Freehold than the Estate of the other, which (as to him) is but an Estate for the Life of another. Also a Term only for Life, or Years, shall be surrendered, for no Surrender shall be of a Fee Simpleⁱ.

An Estate for Life is for one's *own Life*, or for the *Life of another*.

Two especial Estates for one's *own Life*, *Tenancy by the Curtesy* and *in Dower*, arise after the Death of the Person who hath such an Inheritance joined with the Freehold (for both may be of a Reversion dependant upon an Estate for Years^k, and consequently of a Rent if any be reserved^l, but not where a Man hath an Estate for Life Remainder to another in Tail, Remainder to his own right Heirs) as^m may descend to the Issue between that Husband and Wife; as upon a Gift to a Man and the Heirs which he shall beget on the Body of his Wife, that same Wife shall be endowed, but not a second Wife. And upon Land given to a Woman, and to the Heirs of her Body begotten by her Husband, the same Husband may be Tenant by

^f 22 H. 6. 5.

^g Perk. 113.

^h 24 Ed. 3. 32. b.

ⁱ 12 H. 4. 21.

^k Co. Litt. 32. a. 29. 1. Lutwy. 729.

^l Rol. Abr. 678. pl. 7.

¹ 46 Ed. 3. 16. b. 49 Ed. 3.

¹⁵ b. 1 Rol. Abr. 677. pl. 10. S. C. For it is not a Fee in Possession.

^m Lijet. 53.

the Curtesy, but not a second. So of Lands^a given to a Man, and to the Heirs of his Body, or to a Woman
 [30*] and to the Heirs of her Body, whatever Wife the Husband takes, shall be endowed, and whatever Person the Woman takes to Husband, he may be Tenant by the Curtesy.

And both may be prohibited at the Suit of him who hath the Inheritance, that they make no Waste to the Destruction of the Inheritance: But this Writ doth not lie against Lessee for Life or Years, for they come in by the Party himself; but in the Cases before, the Law creates their Estate.

Statutes.

Vide Marlbridge, cap. 23. *Farmors shall not make Waste, Sale, or Exile of Houses, Woods, or Men, except they have a special Licence by Writing of Covenant, making mention that they may do it, upon Pain of Damages, and grievous Amercement.*

Vide Gloucester, cap. 5. *Gives a Writ of Waste against Tenant by the Curtesy, for Life, Years, or in Dower. And he shall lose the Place wasted, and treble Damages.*

Vide Westminster 2. cap. 14. *Process in a Writ of Waste shall be Summons, Attachment, Distress, and upon Default, it shall be commanded to the Sheriff, that he take with him twelve, &c. and go to the Place wasted, and there enquire of the Waste, and return Inquest.*

Vide 20 Ed. 1. De Vasto. *The Heir shall have this Writ, where the Ancestor sues a Writ of Waste, and dies pending the same.*

Vide 11 H. 6. cap. 5. *It lies against the Farmor who grants over his Estate, and yet takes the Profits.*

Tenancy^o by the Curtesy, is such an Estate, by which (the Wife having actual Possession) the Husband, who hath Issue by her, born alive, shall have the whole; whether such Issue be Male or Female, heard to cry, and whether it die^a after, or continue alive; and if the Issue be born alive it is sufficient, although it be not heard to cry^b, for it may be born Dumb. But

^a 8 Co. 34. b. ^o Littleton, §. 35. ^a Co. Litt. 30. a. ^b Dyer, 25. pl. 159. Fitz herbert. Co. Litt. 29. b. 8. Co. 35. a. 1 And. 35. Old Bendl. 25.

no Tenaney^e by the Curtesy, shall be of a Possession in Law, as where Lands descend to a Woman, and she die before any Entry by her, or the Husband, or any for them; nor of a Thing in suspense^d, as where Tenant in Fee of Land takes a Wife, who is seized of the Seigniori in Fee, the Husband shall never be Tenant by Curtesy of the Seigniori, for by the Inter-marriage it is suspended. And it is called *Tenancy by the Curtesy of England^e*, because it is not used in any other Realm.

Statutes.

De Tenentibus^e per Legem Angliæ. *He that hath [b] a Son, or a Daughter by a Woman, beared to cry, shall be Tenant by the Curtesy. And the second Husband in such Case shall be Tenant by the Curtesy; whether she had a Heir by the first Husband or not.*

Dower^g, is such an Estate, by which a Woman shall have the third Part of that which belonged to her Husband, to be assigned to her in Severalty. The Feme^{*} here ought to be nine Years of Age at the Death of her Husband.

Detinue of Charters^h which concern the Inheritance descended to the Heir, is a Bar of Dower, so long as she detains them; but otherwise of Chartersⁱ which concern Land purchased by the Heir.

Maxim. If the Husband^k at the Door of the Church (which is called Dower *ad ostium Ecclesiæ*) or (being Heir^l Apparent) by the Assent^m of Father and Mother (which is called Dowment *ex assensu Patris, &c.* for the Son[†] ought to make the Dowment, and they to assent) presently[‡] after the Espousels (not before)

^e Co. Litt. 29. a. 21 Ed. 3. 21. 3 H. 7. 5. F. N. B. 149. Dr. & Stud. 1. 2. c. 15. ⁸ Co. 34. b. ^d Perkins, 60. g. Co. Litt. 29. b. 1 Ed. 3. 6. 5 Ed. 3. 26. 3 Leon. 247. ^e Litt. §. 35. Co. Litt. 30. a. ^f Vet. Mag. Cha. ⁸ Litt. §. 36. ^{*} 12 H. 4. 1. F. N. B. 149. 1. Dr. & Stud. 1. 1. c. 7. ^h 9 Ed. 4. 47. Bro. Dower, 53. ⁱ 2 H. 7. 6. 22 H. 6. 16. Bro. Dower, 47. 22 H. 6. 42. Newton. Bro. Dower, 48. Dyer, 230. pl. 52. 33 H. 6. 51. 41 Ed. 3. 11. 6 Ed. 3. 45. Doc. Pla. 150. ⁹ Co. 18. a. ^k Littlelet. §. 39. ^l Co. Litt. 35. b. ^m Littlelet. §. 40. [†] 8 Ed. 2. F. Dower, 154. Co. Litt. 35. b. [‡] 40 Ed. 3. 43. 3 H. 6. 4. Co. Litt. 34. a.

do endow his Wife of any Certainty, as of the Whole, a Moiety, or lesser Part, &c. this shall be ^a a Bar of the third Part, if she assent: but otherwise of an Endowment *ad ostium ° Camerae*, and of an Endowment ^p *ex assensu Fratris*, or *Consanguinei*: And hereupon ^q, it is at the Election of the Wife, after the Death of her Husband, to keep herself to such Endowment, or to be endowed at Common Law. And in such Endowments ^r, the Woman, after the Death of her Husband, may enter without any Assignment (because the Certainty of the Land, which she shall have, appears) but so may not she in the Dower at the Common Law.

Statutes.

Vide Magna Charta, cap. 7. *That a Woman shall abide forty Days in the chief Messuage of her Husband, if it be not a Castle, and if it be a Castle, then another competent House shall be provided for her, until Dower be assigned her; which is called her Quarentine.*

Vide Westminster 2. cap. 34. *A Woman who elopes from her Husband, and carries with the Adulterer, shall not have her Dower, except the Husband voluntarily and without Ecclesiastical Coercion be reconciled, and suffer the Woman to inhabit with him.*

Vide 11 H. 7. cap. 20. *If a Woman, who hath a Jointure of the Provision of her Husband, or his Ancestors discontinued, or suffer a Recovery by Covin, this shall be void; and he, to whom the Land ought to come after her Death, may enter as if she was Dead, without any Discontinuance or Recovery.*

[31*] 27 H. 8. cap. 10. *An Estate to the Husband and Wife, and to the Heirs of the Husband, or of the Bodies of both, or for their Lives, or the Life of the Wife for her Jointure, shall be a Bar of Dower. Upon Eviction of her Jointure, she shall be endowed. If the Jointure*

^a Litt. 41. ^o 10 H. 3. Fitz. Dower, 200, 201. Bract.
1. 2. c. 18. Britton, c. 101. Fleta, lib. 5. cap. 23. pl. 4.
Mirror, cap. 1. §. 3 & cap. 5. F. N. B. 150. m. Co. Litt.
34. a. Perk. 306. ^p 8 H. 3. Fitz. Dower 193.
29 Ed. 3. Fitz. Dower, 134. F. N. B. 150. l. Co. Litt. 35.
b. ^q 21 H. 6. 25. b. Littlet. §. 41. ^r Ibid. 39. 40.

be made after Marriage, she may refuse it, and have her Dower, except the Jointure was by Act of Parliament.

All these are Estates for one's *own Life*. In Estates for the *Life of another*, if the Tenant die in the Life of *Cestuy que vie*, he who first enters shall have it during the Term, who is called an *Occupant*; but upon Land leased to one, and his Heirs, for the Term of Life of another, there his Heir shall have it, and shall oust the Occupant^a.

C H A P. IV *.

Of Land and Rents.

Hereditaments concern *Land* or the *Person*.

In all Things but Land itself (for in Land^a Prescription maketh not any Right) but in^b Rent or Profit out of Land a Man may prescribe against another, that is to say, make a good Title, that he and his Ancestors for Time, &c. have had and enjoyed it; as that they have been seized of a certain annual Rent out of Land, and have distrained for it, being in Arrear; or of a Villain^c and his Ancestors, as of Villains in Gross; or that a Man, and all those^d whose Estate he hath in the Manor of *Dale*, have had a Park there for time, &c. For of such Things as may not be granted without Deed or Fine, as in the Case of a Villain in Gross, a Hundred, Rent, or the like, the Prescription shall be in him and his Ancestors, whose Heir he is^e, and not in him, and those whose Estate he hath, because that he may not have their Estate without Writing, which ought to be shewn to the Court. But otherwise of Things appendant, or regardant to a Manor.

^a Co. Litt. 41. b. Occupancy is now prevented by Stat. 29 Car. 2. c. 3. § 12. Vide. ^b Dr. & Stud. l. 1. c. 8. 8 H.

6 16. Bro. Prescription, 19. But in Tenancy in Common, one may make Title to Lands by Prescription. Littlet § 310. 8 H. 6. 16. Bro. supra, & Tit. Trespass, 122. ^c Dr. & Stud.

supra. H. 19 Ed. 3. Fitz. Title, 34. Co. Litt. 144. a.

^e 19 H. 6. 34. Littlet. §. 182. ^d 3 Ed. 3. Itin. North.

Bro. Incidents, 39. ^e Littlet. §. 183.

Those

Those Hereditaments which concern Land are extinguished, when he that shall have them, hath also the Land in as high and perdurable Estate as he hath the Hereditaments themselves; otherwise they are but suspended: As where^c the Lord purchases the Tenancy in Fee, and altho' it be to him and another, and the other survive; for his Estate is as high in the Tenancy, as it was in the Seignior; but if he who hath a Rent Charge in Fee, grants this for Life to the Tenant in Fee of the Land, or in Fee to Tenant for Life of the Land, this goes by way of Suspension of the Rent. And therefore in the^d first Case, the Grant may be with a Remainder over; and in the^e second Case the Tenant may grant this Rent in his Life, and his Heir shall have it after his Death, for the Estate was not as high in the one as in the other. So if a^f Man, who hath a Rent Charge in Fee, marry a Woman who is Tenant in Fee of the Land; or if the Tenant infeoffe his Lord upon Condition; for there in the first Case, the Husband may grant this Rent notwithstanding the Intermarriage; and in the second Case, if the Tenant enter for the Condition broken, the Seignior is revived^g, for the Estates are not as perdurable the one as the other.

[b]

Sometimes also they are apportioned.

Hereditaments, which concern Land, are in *Demesne* or otherwise.

In *Demesne*^h, which are in manual Occupation or Receipt, as Land itself or Rent.

Under the Name of Landⁱ, are comprehended not only Gardens, Meadows, Pasture, Woods, Rivers, and the like, but also Messuages; Tofts, Mills, Castles, and the like; which being built upon the Land are of the Nature of the Land itself; for in a^m *Præcipe quod reddat* of a Messuage, the Warrant of Attorney is, that such an one hath put in his Place J. S. in a Plea of Land.

^c 34 Aff. pl. 15.

^d Abridgment of Assizes.

^e Perk.

113. b.

^f 8 Ed. 3. 16.

^g Co. Litt. 314. a. Perk.

19.

^h Littlet. §. 10.

ⁱ Co. Litt. 4. a.

^m 2 Rol.

Abr. 57.

ⁿ 2 Rol. Rep. 265.

Palm. 320.

^o 4 Co. 87. b.

The

The eldest ⁿ Coparcener here upon Partition, shall have the Capital Messuage.

The Freehold ^o of Land passes by Livery of Seizin only. And by this a Freehold shall pass, altho' he who makes the Livery be but Tenant for Years, at Will, or Sufferance.

1. *Maxim.* Livery within the ^p View (be it by Delivery of the Deed of Feoffment within the View or otherwise) is good, if the Feoffee enter in the Life of the Feoffor, otherwise the Land descends to the Heir of the Feoffor, and the Feoffment shall never take Effect.

2. *Maxim.* Exchange ^a and Dowments ⁱ, that is to say, *ad ostium Ecclesie*, and *ex assensu Patris* and a Release ^b or Confirmation, where it enures by way of Enlargement of the Estate, as to the Lessee for Years to have for Life or in Tail, are good without Livery of Seizin.

Rent is an annual Sum of Money, or the like, which is to be paid out of Land.

If he hath Livery to distrain for it, viz. when the Rent is in Arrear, to take any Thing that he finds there, and impound it until the Rent be satisfied, it is called a Rent Service, or Rent Charge ⁱ, as where a Man who is seized of Land Grants by his Deed Poll, or by Indenture, an annual Rent issuing out of the same Land to another in Fee-Simple, or Fee-Tail, or for Term of Life, &c. with Clause of Distress; or makes a Feoffment in Fee by Indenture, reserving to himself an annual Rent with Clause of Distress.

PREROGATIVE.

The King may distrain in any other Land of the same Person for his Seignior, or Rent Charge, but so shall not his Grantee. 13 Ed. 4. 26. Bro. Distress, 49. 44 Ed. 3. 45. Ibid. 6. Fitz. Grants, 47. Plowd. 239. 44 Aff. pl. 32. Bro. Distress 88.

[32]

ⁿ The Statute of Ireland, 14 H. 3. recites the Common Law to be so.

^o Litt. § 59. 349. ^p 38 Ed. 3. 11. ² Ro. Abr. fo. 3. ³ 8 Aff. pl. 2. ¹ Co. 156. a. ⁴ 3 Aff. pl. 20. Temp. H. 8. Bro. Feoffments, 70. 18 Ed. 3. 16. b. Co. Litt. 48. b. ⁵ Co. Litt. 49. a. Littlet. §. 62. ² Ro. Abr. 1. pl. 2. ⁶ 40 Ed. 3. 43. Bro. Dower, 7. Co. Litt. 49. a. ⁷ Co. Litt. 50. a. b. ⁸ Littlet. §. 213.

And

And upon every Distress^a only those Goods which are not part of the Freehold or fixed to it shall be distrained and none other; as a Cart^b full of Corn may, so may a Fold^c of Sheep, or a Mill-stone^{*} (if it is not Parcel of the Mill, tho' it be fixed with Nails to a great Piece of Timber) Windows also and Doors, when they are removed from the Hooks; but altho' a Mill-stone^d be raised up to be picked and clean'd, yet all the while that it lies upon another Stone, it remains Parcell of the Mill, and may not be distrained; no more may Windows^e, or Doors, notwithstanding that they hang upon Hooks, and are removeable.

Also he shall not^f distrain in other Land, than that which is holden of him, or charged with the Rent, except it be by Grant of the Tenant; nor can a Distress be but upon Land in Demesne, for upon Tithes^g leased reserving Rent, the Tithes may not be distrained, nor when they are divided from the nine Parts; nor may a Distress be taken in a^h Piscary, except it contain Land and Demesne.

Statutes.

Vide Marlbridge, cap. 15. *Distress shall not be taken in theⁱ Highway, except by the King.*

Vide Articuli Cleri, cap. 9. *It shall not be taken in the Ancient Fees of Churches.*

The Distress being put in^k Pound-overt, (that is to say, some Place where the Owner may lawfully come to give them Meat, or the like, if they be Goods which have Life) he that made the Distress is excused, whatever Loss or Damage happens to them; for liv-

^a Co. Litt. 47. b. ^b 2 H. 4. 15. 18 Ed. 3. 4. a. 22 Ed. 4. 50. b. 11 H. 7. 14. a. 7 H. 7. 10. 21 H. 7. 39. b. Kelwey 125. b. Noy's Max. 42. Co. Litt. 47. a. 2 Inst. 82. And at this Day, Sheaves of Corn may be distrained by Stat. 2 W. & Mary. c. 5. And see that Statute. ^c 20 Ed. 4. 3. b. ^{*} 14 H. 8. 25. Bro. Distress, 23. ^d 14 H. 8. 25. b. Ante. 10. b. ^e 21 H. 7. 26. Co. Litt. 47. b. ^f 9 H. 6. 9. Bro. Distress, 1. 13 Ed. 4. 6. ^g Bro. Distress, 68. Vaughn. 204. 11 H. 4. 40. ^h Co. Litt. 144. a. ⁱ One may distrain in Viâ Regiâ, for an Amercement in a Leet, Temp. Ed. 1. Fitz. Avowry, 232. 19 Ed. 2. Ibid. 221, 225. 47 Ed. 3. 13. ^k Dr. & Stud. l. 1. cap. 5. lib. 2. cap. 27. Co. Litt. 47. b. 2 Inst. 106. 1 Rol. Abr. 673. 9 Ed. 4. 2.

ing Things shall be put in a Pound-overt, to the end that the Owner may give to them Sustenance; but Goods which have not Life, need not, but if they come to Damage by Default of him who distrained, he shall answer for them.

Statutes.

Vide Marlbridge, cap. 4. *None shall lead Distresses out of the County where they are taken.*

Vide 1 & 2 P. & M. cap. 12. *Distress of Cattle, shall not be driven out of the Hundred, except to a Pound-overt, within three Miles.*

One Distress shall not be impounded in several Places.

The Fees for impounding.

If he hath not any Liberty to distrain, it is called a Rent-Seek: As where a Rent is so granted, or reserved, as is aforesaid, but no Clause is in the Deed, that if the Rent be behind, it shall be lawful for him to distrain¹.

[b]

A Rent granted for equality of Partition between Coparceners, is distrainable of common Right^m, as where two Houses descend, one of the Value of 20 s. *per Annum*, and the other of 10 s. *per Annum*, and are allotted, the one to the one Coparcener, and the other to the other Coparcener; and that Coparcener, who hath the House of 20 s. *per Annum*, granteth to the other a Rent of 5 s. to be paid to her yearly; then this is distrainable of common Right.

Statutes.

32 H. 8. cap. 37. *The Executor, or Administrator of him who hath Rent or Fee-Farm in Fee, in Tail, or for Life, shall have Debt against the Tenant who ought to pay the same, or may distrain him.*

A Husband seized of any Estate in any Rent or Farm, in Right of his Wife, he, his Executors, and Administrators, shall have the same Remedy. So of him who hath a Rent for the Life of another, and Cestuy que vie die,

¹ Littlet. §. 218.
l. 2. c. 9.

^m Littlet. §. 251, 252. Dr. & Stud.

CHAP. V*.
OF SEIGNIORIES.

THOSE Hereditaments which are *not in Demefne*, are *Seigniories*, or *others*.

PREROGATIVE.

(1.) All Lands are holden of the King immediately or mediately; he himself having none above him upon Earth, of whom to hold (50 Aff. pl. 1. Plowd. 498. 48 Ed. 3. 9. Co. Litt. 1. 2 Inst. 501. 4 Inst. 192).

(2.) Escheats of all Cities belong to the King, of whomsoever they are holden (8 Ed. 2. Fitz. Escheat 12. 3 Inst. 147).

1. A *Seigniorie* is, when Land is holden of one by certain Services; for every Land is holden of some Person; and if a Feoffment be made without mention of any Thing to be done, or performed, such a Feoffment is void^a.

2. And therefore, when he, who hath the Fee, dies without Heir, the Land escheats to the Lord; as if Land^o descends to the Father, and he die without Heir of the Part of the Father, altho' that he hath an Heir of the Part of the Mother; or if a Bastard^p purchase Land, and die without Issue.

[33] The Grantee of Fee-simple shall hold of the Grantor by the same Service that he holdeth over, if other Services are not reserved, and then he is called *Mesne*; as if there be Lord and Tenant by Knight's-service, and the Tenant before the Statute of *Quia emptores terrarum* infeoffed a Stranger of the Tenancy without any thing reserved, now the Feoffee and his Heirs shall hold of the Feoffor and his Heirs by Knight's-service^q.

Or the Grantor may appoint him to hold of the Lord next Paramount; as if before the Statute of *Quia emptores terrarum* there be Lord, Mesne, and Tenant, and the Tenant infeoffe a Stranger to hold of the Mesne, this is good, and the Feoffee shall hold of the Mesne by the same Services by which his Feoffor held; and the Feoffor may not reserve new Services, for to

^a 7 Ed. 4. 12. b.
3 Peere Williams, 33.
Fitz. Annuity, 52.
by 12 Car. 2. c. 24.

^o Littlet. §. 4.

^q Perk. 134.

^p 35 Aff. pl. 7.

³ Aff. 8. 33 Ed. 3.

2 Inst. 501. but Knight's Service is abolished

them

them the Mesne is a Stranger; but if the Feoffment be to hold of the Lord Paramount, this is void, or if it be to hold of any other Stranger^r.

Statutes.

18 Ed. 1. *Quia emptores Terrarum. Upon a Feoffment in Fee, the Feeffee shall hold of the Lord Paramount by the Service of the Feoffor. If the Feoffment be of parcell, he shall hold for that parcell.*

But Donees in Frank-marriage may not hold but by Fealty; and therefore upon a Gift in Frank-marriage^a rendring Rent, the Reservation is void, for it is contrary to the Nature of Frank-marriage, which is without rendring any thing until the fourth Degree be past; and this is of the Donor until the fourth Degree be past; and therefore at this Day a Gift in Frank-marriage, Remainder^b in Tail to a Stranger is a good Frank-marriage, for the Reversion of the Fee is in the Donor, which makes a Tenure between them; otherwise if the Remainder^c was in Fee.

The^d Grant of a Seigniorie or Rent, or of a Remainder or Reversion of Land, is not good without^e Attornment, that is to say, the Agreement of that Tenant who ought presently to be charged: As where^f there is Lord, Mesne, and Tenant, and the Lord grant his Seigniorie, the Mesne ought to attorn, and not the Tenant Paravail, for the Mesne is Tenant to the Lord. Where^g there is Lord and Tenant, and the Tenant leases for Life, or gives in Tail saving the Reversion, now if the Lord grant his Seigniorie, he in the Reversion ought to attorn, and not the Tenant for Life or in Tail, for he in the Reversion is Tenant to the Lord, so

^r Perk. 127. ^a 4 H. 6. 22. Martin Bro. Frank-marriage, 3. 16 Aff. pl. 66. Richen. Bro. Ib d. 5. 32 Ed. 1. Fitz. Tail, 31. Co. Litt. 21. b. Bac. Elem. 45. Ante, 6. a. ^b 20 Ed. 2. Fitz. Aid. 174. 31 Ed. 3. Fitz. Gard. 116. Co. Litt. 21. b. ^c Temp. H. 8. Bro Frank-marriage, 11. Bac. Elem. fo. 44. Arg. in the Case of Revocation of Uses. 17 Ed. 3. 65. ^d Co Litt. 312. a. ^e Note, At this Day this Learning is out of Use. For by the 4. Anne, c. 16. all Grants, &c. of any Manors or Rents, or Reversions, &c. shall be good without Attornment of the Tenants. And vid. 11 Geo. 2. c. 19. ^f Littlelet. §. 555. ^g Ibid. §. 554.

are not the others. But if ^h the Tenant leases for Life Remainder in Fee, there upon a Grant of the Seigniorship Tenant for Life ought to attorn, for he is Tenant to the Lord, so is not he in Remainder during the Life of Tenant for Life. If Land be leased for Years, or a Gift in Tail be, saving the Reversion, upon a Grant of the Reversion Ter-tenant ought to attorn. And Attornment may be either by Paroll, as to say, I agree to or am content with the Grant, or I attorn to you, and become your Tenant by force of the Grant; or otherwise, as by Delivery of a Penny, or a Half-penny, or a Farthing to the Grantee in name of Attornment, or by any other Matter which implies an Agreement, as a Surrender to the Grantee of the Reversion, praying in Aid of him, &c. And if such Attornment be not to the Grantee in the Life of the Grantee, the Grant is merely void.

In the Grant of a Reversion dependant upon a Freehold, it suffices that the Tenant of the Freehold attorn, altho' he is not the Person who is presently to be charged; as upon a Lease for Years, Remainder for Life, and he in the Reversion grants his Reversion to another, it suffices that he in the Remainder attorn.

For all Services ⁱ Distress lies of common Right: And hereupon there are two Writs.

The one is a Writ * *De Exoneracione Seclæ*, which lies for Tenants who hold by Suit of Court, or other Rents or Services, that they be not distrained to do the same at such Time as they are to hold the Land discharged; as one who is in Ward of the King, a Feme endowed in the Chancery of Land in Ward of the King, and Tenants Paravail of such Lands in Ward, that is to say, where the other Lords of whom the Heir holds, do distrain. For ^k during the Time that the Heir is in Ward to the King or his Committee, he is not to do any Suit of Court, or other Services; and if any Distress be taken, it is to be restored by this Writ.

^h Littleton. §. 557. ⁱ Dr. & Stud. l. 2. c. 9. * F. N. B. 158.
^k Bracton, lib. 1. fo. 87. Vide Fleta, lib. 1. cap. 11. pl. 2.

¹ The other is a Writ *De deonerando pro rata*: Which lies for Tenant of Parcell of the Land being lawfully distrained for the whole Rent or Services to discharge him in proportion to the Rate of his Land; as where a Man, who holdeth two Acres of Land by the Service to repair a Bridge, alien in Fee twenty Acres to one, and twenty Acres to another, and afterwards (upon a Presentment thereof) one of the Alienees is distrained to make the Reparation; or where the Tenant of the King by Fealty and Rent alien Parcell of the Land, and the King's Officers distrain the Alienee for the whole Rent; for the King is not bound by the Statute of *Quia emptores terrarum*, which willeth that the Feoffee shall hold *pro particulâ*, but he may distrain for the whole Rent in the Part of the Alienee. But this does not lie where he who holdeth of a common Person by Fealty and Rent, alien Part of his Land; for the same Statute restrains the Lord that he do not distrain the Alienee, but according to the Rate and Value of the Land which he hath purchased.

Statutes.

Vide Magna Charta, cap. 10. *None shall be distrained to do greater Service than is due.*

Vide Marlbridge, cap. 2. *None shall distrain any to come to his Court who is not of his Fee, nor shall distrain out of his Fee.*

Vide Marlbridge, cap. 9. *None shall be distrained for [34] Suit of Court, if he is not bound to do it by Charter of Feoffment.*

Process in Contra Formam Feoffamenti, and also where the Tenant withdraws his Suit, is Attachment, Venire facias, and Grand-Distress.

Services are either corporal, which are to be done but once, or they are such as are to be done oftentimes.

Corporal; as *Homage and Fealty.*

Homage is an Oath to be his Man, and to be faithful and loyal to him for the Tenements which he holdeth of him^m.

¹ Regist. 268. a. F. N. B. 234. Plowd. 125. 2 Inst. 67.

^m Littlet. §. 85. This Service is abolished by the 12 Car. 2. c. 24.

As to say, *I become your Man from this Day forwards of Life and Member, and of earthly Worship, and to you will be faithful and loyal, and Faith to you will bear for the Tenements which I claim to hold of you, saving the Faith which I owe to our Lord the King.*

When he doth Homage to his Lord, he shall be ungirt, and his Head uncovered, and his Lord shall sit, and he shall kneel before him upon both his Knees, and shall hold his Hands extended and joined together between the Hands of his Lord.

Homage shall only be done once during the Life of the Tenant; so that when he hath done this once, he shall never do it again; nor to the Heir of the Lord, nor to the Grantee of the Services, nor to the same Lord^a if other Lands afterwards descend to the Tenant, which are holden of him by Homage; and altho' this be in the Case of the King.

And Homage^b shall be done only to the Lord himself; but the Steward or Bailiff of the Lord may receive Fealty for him.

PREROGATIVE.

The Chamberlain of the King shall take Homage for him, F. N. B. 256. e.

Vide 33 H. 8. cap. 22. *A Fee appointed for respite of Homage in the Exchequer, or other Courts.*

Also^c none shall do nor receive Homage, but he that hath a Fee-simple, or in Tail, in his own Right, or in the Right of another; for Tenant for Life shall not do nor receive Homage, as a Husband who hath Land in the Right of his Wife, if he hath Issue by her, shall do Homage in the Life of his Wife, but not after her Death, if he holdeth himself in as Tenant by the Curtesy.

The eldest Daughter alone shall do the Homage, where the Inheritance descends to Parceners.

PREROGATIVE.

If Coparceners hold of the King, all shall do Homage (Co. Litt. 67. a.

where Coparceners hold of the King, all shall do Homage; where of a Common Person, the eldest only.

^a 24 H. 8. Bro. Fealty, 8. ^c Littlet. §. 90.

Statutes.
14 H. 3. Stat. Hiberniæ, re-

cites the Common Law to be, that

^b Brañ. Lib. 2. fo. 80. Littlet.

Fealty

Fealty is an Oath of *Fidelity and Loyalty*: As much [b]
as to say, *I to you will be faithful and loyal, and Faith to
you will bear for the Tenements which I claim to hold of
you, and lawfully to you will do the Customs and Services
which I ought to do to you: So help me God^d.*

And ^e this is incident to every certain Estate: For
Lessee for Life or Years ^f shall do Fealty of common
Right; but Tenant at ^g Will shall not do it, because
he hath not any certain Estate.

And therefore, altho' in its own Nature this be but
once to be done, that is to say, to the same Lord by the
same Tenant, and for the same Land, yet upon every
Alienation of the Tenancy or Seignior, be it by De-
scendant or Grant, it shall be done again.

All other Services, whether of Soccage or in Chivalry,
commence by Reservation.

Statutes.

17 Ed. 2. de Homagio faciendo, describes how Ho-
mage and Fealty shall be done, viz. in the Manner above
mentioned.

Those Services which are *oftentimes* to be done,
whether every Year or otherwise, are of many Sorts, as
Rent-service, Heriot-service, that is, to render to the
Lord the best Beast when the Tenant dies, and all Ser-
vices which lie in *Feasance*, as to be Butler to a Man, or
Carver, or to scour his Ditches, &c. but Reservation of
Things which lie in *Prender* or *User*, as to have Com-
mon for four Oxen, or four Cart-loads of Wood,
makes no Tenure ^h.

The particular Kinds of Services by which Lands of
Inheritance are distinguished, are *Knight's-service* and
Soccage ⁱ.

Both of them draw to the Lord two Improvements;
one is a *reasonable Aid* to make his eldest Son a Knight ^a,
and to marry his eldest Daughter; for if the Lord confirm
to the Tenant to hold by Fealty and certain Rent ^b,

^d Littlet. §. 61. This Service is expressly saved by 12 Car. 2.
c. 24. ^e Littlet. 93, 132. ^f Co. Litt. 67. b. ^g Co. Litt.
63. a. ^h Perk. 127. ⁱ Littlet. §. 118. ^a These
Aids are abolished by the 12 Car. 2. c. 24. ^b 18 Ed. 3. 16.
40 Ed. 3. 22. 13 Rich. 2. Fitz. Avowry, 89. 14 H. 4. 8.
5 Ed. 4. 41. 2 Inst. 232.

and release to him all other Services and Demands, yet he shall have reasonable Aid; for it is incident to Services, and is not released by such Words. And the Lord shall have a Writ of Aid *pur faire Fits Cbivaler, & pur File marier*,
Statutes.

Westminster 1. cap. 36. *Reasonable Aid shall be 20 s. for a whole Knight's Fee, and for 20 l. Land in Soccage, and so according to the Rate thereof.*

[35] The ^a Time of levying it shall be, to make the eldest Son a Knight at Fifteen Years of Age, to marry the Daughter at Seven. If the Father dies after Aid levied, and before the Marriage of the Daughter, the Executors shall be chargeable to the Daughter; or the Heir, if the Executors have not Affits.

25 Ed. 3. cap. 11. *Reasonable Aid in the Case of the King shall be levied upon all Lands holden of the King without Mean, according to the Rate aforesaid.*

The other Improvement is Relief ^c after the Death of the Tenant.

Knight's-service is a Service concerning War to be done by the Body of a Mán. As if he holds ^f by the Service to be personally, or by some other for him along with the King, well and conveniently arrayed for the War, when the King makes a Voyage Royal, (that is to say, in his proper Person, or by his Lieutenant) into Scotland or Wales; where ^h if he holds by the Service of a whole Knight's-fee, he ought to be with the King by forty Days; if by the Moiety of a Knight's fee, then by twenty Days, and so proportionably. And if he be not with the King, ⁱ he shall pay so much Money as shall be assessed by Parliament; which is called Escuage incertain, being put a Penalty ^k for the not doing of his Service; and it shall be recovered by a Writ *de Scutagio habendo*. Also if a Man ^l

^c Register. 87. a. F. N. B. 82.

^d F. N. B. 82, 83. 2 Inst.

234, 235.

^e Note, that Relief as to Soccage Tenures is expressly saved by 12 Car. 2. c. 24. Vid. Trin. 35 Car. 2. C. B.

Freeman, v. Booth, 3. Lev. 145.

^f Littlet. §. 96.

^h Littlet.

§. 95.

ⁱ Littlet. §. 97, 98.

^k 6 Co. 2. a.

^l Littlet.

§. 111, 156. F. N. B. 83. e.

holds of any Lord, to keep his Castle in Time of War (which is called *Castle-guard*), or to blow a Horn in the Time of Invasion by an Enemy (which is called *Cornage*), both these are Services in Chivalry.

Statutes.

Vide Magna Charta, cap. 37. *Escuage shall be taken as it hath been used in the Time of H. 2.*

Vide Magna Charta, cap. 20. *None shall be distrained for Castle-guard if he will do it by himself, or by any other if he himself cannot do it for reasonable Cause. And if the King sends him into the War, he shall be quit of Castle-guard for the Time.*

And to Knight's-service Homage is always incident; so it is not to Soccage*.

^m The Relief here is 100 l. for an Earldom, 100 Marks for a Barony, and 100 s. for a whole Knight's-fee, and so in proportion.

Statutes.

Vide Magna Charta, *that this above is the ancient Relief.*

Soccageⁿ is every Tenure that is not a Tenure in Chivalry: As if a Man holds by Fealty only, or by Fealty and certain Rent, or by Homage, and Fealty, and Rent, for all Manner of Services, or by Escuage certain, that is to say, to pay a certain Sum of Money, as half a Mark, &c. and no more nor less (to whatever Sum the Parliament assesses it), to find a Man for the War, when the King make a Voyage Royal into Scotland or Wales; or by the Service to pay a certain Rent for Castle-guard, &c. [b]

The^c Relief here is the Rent of one Year to be paid presently; as if the Tenant holdeth of the Lord by Fealty and 10 s. Rent payable at certain Days in the Year, as at two Terms in the Year, or at four Terms in the Year, then the Tenant shall pay to the Lord for Relief 10 s. besides the 10 s. which he shall pay for the Rent, and this presently without tarrying until the Day

* 7 Ed. 4. 28. b. ^m Co. Litt. 69. b. 83. b. 7 Co. 33. b.
9 Co. 124. a. ⁿ Littlet. §. 117, 118, 120, 121. ^o Littlet.
§. 126, 127. Dr. & Stud. l. 1. c. 7.

of Payment of his Rent, and of what Age soever the Heir be.

A Tenure of a Man as of his Person is called a Seigniorie in Gros. There is another Tenure as of a Manor, of which shall be spoken hereafter.

Prerogative.

To hold of the King as of his Person, is called a Tenure *in Capite*. But if the Prince of Wales, before the Statute of *Quia emptores Terrarum*, makes a Feoffment to hold of his Person, and afterwards becomes King, this is not a Tenure *in Capite*; for a Tenure *in Capite* is the highest and most honourable Service in the Law, because that it is done to the chief Head of the Body of the Realm, and therefore ought to be done immediately to the King, and takes its original Creation from the King himself not from a Subject. So to hold of the King, as of his Honour of Gloucester, is not a Tenure *in Capite*, for it is not of the Person of the King.

Statutes.

Magna Charta, cap. 31. *Upon a Common^a Escheat of a Barony to the King, the Tenant shall not pay to the King other Relief, nor do other Services than before; nor shall the King have by reason thereof any Escheat or Wardship.*

1 Ed. 3. cap. 13. *A Tenure of the King as of an Honour, is not in Chief.*

1 Ed. 6. cap. 4. *A Tenure of the King, as of an Honour, Manor, &c. which comes to the King by Attainder of Treason, Misprision of Treason, or Præmunire, or by Dissolution of Monasteries, shall not be in Capite.*

Upon every Tenure *in Capite* the King shall have (besides^b Relief) premier Seizin, when the Heir is of Age, and out of Ward; that is to say,

^a That this Stat. extended to Escheats for Treason, as well as to common Escheats, vide 2 Inst. 64, 65.

^b Bro. Relief 12. Note this a distinct Clause, and not intended to be paid as *Primer Seizin* when the Heir is out of Ward; for Relief is due when the Heir is of full Age, at the Death of his Ancestor, as the Book above cited speaketh, and shall not regularly be paid, when the Heir hath been in Ward. Post. 43. a.

In ^c *Chivalry in Capite*, the Value of the whole Land, that is, as well of the Land holden of others, as of himself, for half ^d a Year if the Heir have been Ward, and for a whole Year if he have not been in Ward.

In Soccage ^e *in Capite*, the Value of the same Land that is holden of him for a Year, if the Heir was at the Age of Fourteen at the Death of his Ancestor; therefore there the Heir shall be compelled to sue Livery, [36] but not if he be ^f under Fourteen at the Death of his Ancestor. And if he being ^g within Fourteen sue his Livery, this shall be *cum exitibus*, but not if he sue at Fourteen.

Statutes.

Marlbridge, cap. 16. *The King shall have Primer Seizin, as he hath been used to have.*

Prerogativa Regis, cap. 3. ^h *The King shall have Primer Seizin of all Lands whereof his Tenant in Capite died seized in Fee, of whatsoever Age the Heir be, in taking of all Issues until Inquisition, and that he hath taken the Homage of the Heir.*

To hold of the King ⁱ as of his Person, for to do him any more especial Service by the Body of a Man, (as to carry his Lance or Sword before him at his Coronation, to lead his Army, or to be his Marshall, or his Sewer at his Coronation, or to be one of the Chamberlains of the Receipt of his Exchequer, or to find ^k a Man to go to the War for him wheresoever he is within the four Seas, (for if he cannot find any to do the Service for him, he ought to do it himself), this is a Special Service in Chivalry, and is called *Grand-Serjeanty*.

And here the King, ^l in lieu of Relief, shall have the Value of the Land for a Year.

^c 38 H. 8. Bro. Livery, 60. Per experientiam Scaccarii. Stamf. Prerog. 13. b. ^d 8 Co. 172. a. Co. Litt. 77. a. ^e 38 H. 8. Bro. Livery, 60. Dyer, 213, & in Margine. 45 Ed. 3. 11. 35 H. 6. 52. F. N. B. 256. c. Stamf. Prerog. 13. b. Co. Litt. 77. a. M. 32 H. 8. Bro. Gard, 97. ^f Dyer, 362. pl. 18. Co. Litt. 77. a 91. b. ^g F. N. B. 256. c. 259. b. ^h Vide 8 Co. 172. That this Statute is but in Affirmance of the Common Law. ⁱ Littlet. 153. ^k Ibid. 157. ^l Littlet. §. 154. 11 H. 4. 72. b.

To hold ^m of the King as of his Person to do any thing concerning War, but not to be performed by the Person of a Man (as to give to him annually a Bow or a Sword, or the like), is called *Petit-Serjeanty*, and is no more than Tenure in Soccage.

C H A P. VI*.

Of Common, Way, &c.

THE other Hereditaments, that are *not in Demesne*, are these following.

Common, which is a Profit *apprender* in Land, whether it be to pasture there by his Cattle, or to take Estovers, that is, ⁿ *Hedgebote, Haybote, &c.* And ^o upon a Grant of Common, *wheresoever* the Beasts of the Grantor shall go, and he occupies and manures two Acres with his Beasts, the Grantee shall have his Common there, altho' that the Grantor hath not Beasts there at another Time. But if the Grant be *whensoever* the Beasts of the Grantor shall go, &c. there the Grantee shall not have Common but when the Grantor uses it. Also upon a ^p Grant of a Common throughout a whole Manor, yet he shall not have Common in ^q Gardens, or in Lands sown with Corn, &c. nor shall he take his Common with Beasts not commonable, as Hogs, &c. Same Law of such a Grant of Common of Estovers, that is, he shall take reasonable Housebote and Haybote, &c. And such Manner of Profits (altho' they are appendant to a Freehold) may not be divided; ^a for if such Heritage descend to Parceners, one alone shall have the whole Profits, and the other Sister shall

[b]

^m Littlel. §. 159, 160, 161. ⁿ Fleta, lib. 4 cap. 25. ^o 9 H. 6. 36. Per Martin; quod fuit concessum. Bro. Grants, 5. Common. 3. Bac. Elem. 54. ⁱ Ro. Abr. 403, 404. ^p 9 H. 6. 36. Per Babbing. Bro. Grants, 5. ⁱ Rol. Abr. 404. Bac. Elem. 70. ^q But if the Grant be to have Common wheresoever his Beasts shall go, and the Grantor afterwards puts his Beasts in his Garden, the Grantee shall have Common in the same Garden. Ibid. ⁱ Ro. Abr. 403. pl. 4. ^a 2 Ed. 2. Fitz. Dower, 123.

have

have an Allowance: Also a Woman shall have for^b her Dower but an Allowance.

The Grantee of Estovers shall have a Writ to restrain his Grantor from doing Waste whereby he cannot enjoy the Estovers according to the Grant: And this Writ is called *Quo minus*. The Writ is, *We command you, that you do not permit B to make Waste or Destruction in the waste Ground of him the said B, by which A is the less able to have his reasonable Estovers in the same Waste, as he ought and is wont to have, as he saith, &c.**

Statutes.

Merton, cap. 4. *The Lord of Waste, Woods, and Pasture, may approve against his Tenant, leaving him sufficient Common and Pasture according to his Hold, with Egrefs and Regrefs.*

Westminster 2. cap. 46. *Such Lord may approve in the same Manner against his Neighbour who hath common Appurtenant; and also for his Windmill, Sheepcote, Deyrey, enlarging of a Court necessary, or Curtelage.*

3 & 4 Ed. 6. cap. 3. *These Statutes shall not extend to Houses with Land under three Acres inclosed, nor to a Garden, Orchard, or Pond, which do not exceed two Acres.*

Prerogative.

The King hath Forests in his own Soil, and in the Soil of another.

Statutes.

Charta de Foresta, Ordinatio Forestæ, Stat. de Af-fiza Forestæ; 1 Ed. 3. cap. 8. Stat. 1. 1 Ed. 3. cap. 2. Stat. 2. 25 Ed. 3. cap. 7. Stat. 5. 7 R. 2. cap. 3 & 4. 22 Ed. 4. cap. 7. 32 H. 8. cap. 35. Vide.

2. *A Way* over the Land of any one, from one certain Place to another; as from ^c Close to Close, or from his House, or to the King's Highway, to his House, or Land, or ^d the High Street, or Way.

3. *Offices, Dignities, &c. to be exercised concerning Land*; as the ^e Office of Steward, Receiver, or Bailiff

^b V. Co. Litt. 30 b. 32. a.
6. ^d 20 Aff. pl. 18.
Case, 2.

* Old N. B. 159. b. ^c 39 H. 6.
^e Rol. Abr. 838. Plow. Manx,

of a Manor, the ^f Office of Serjeancy, or Keeping of a Church, the Dignity ^g to be Earl of Westmoreland, or the like; and all these may be entailed, and are within the Statute of Westminster 2, because they are exercisable in Land.

[37] Upon an Office granted to an ^h ignorant Man who has no Skill the Grant is void; as if the King by his Letters Patent, make one Clerk of the Crown in the King's Bench, who never was exercised in the Office, nor in any other Office there, and so is wholly insufficient to serve the King and his People, the Grant is void, and the Justices may refuse him. So it is of the Presentation of a Man unlettered to a Church.

Also ⁱ Non-Feefance, and Non-Attendance upon an Office, makes it void; for every Office hath a Condition in Law annexed to it; as if the Marshal suffer a voluntary Escape out of Prison, this is a Forfeiture; but in negligent Escapes, what shall make a Forfeiture of the Office, and what not, and what ought to be a negligent Escape, and how great or small, (as if any that Escape were committed to him for Surety of the Peace, and were suspected Men) lies only in the Discretion of the Court. And ^k the King himself may have an Office, as a Grant of a Forestership in Tail, Remainder to the King and his Heirs, is good, for although he may not in Respect of the Majesty of his Person, exercise the Office himself, yet he may grant it over to one, who may exercise it.

And here-upon there lie some special Writs in some particular Offices, that is to say, a Writ *de Exonerando Viridario Forestæ*, to discharge a Verderor of the Forest upon just Cause. And a Writ *de Electione Veridariorum Forestæ*, for to choose a Verderor of a Forest ^l.

4. Title of Entry, and the like.

^f 18 Ed. 3. 27. Co. Litt. 20. a. ^g 7 Co. 33. Nevil's Case. Co. Litt. 20. a. See Show. Ca. Par. 1. said, that a Dignity is not subject to a Condition at Common Law, nor inalienable by Statute de Donis, notwithstanding what is said in Nevil's Case supra.
^h 5 Ed. 4. Bro. Office, 48. Patents. 108. 2 Rol. Abr. 153.
 9 Ed. 4. 5. Dyer 150. Hob. 148. Co. Litt. 3. b. 11 Co. 87. a. ⁱ 39 H. 6. 31. b. 9 Co. 50. a. ^k 1 H. 7. 29. b.
^l F. N. B. 163, 164.

C H A P. VII*.

Of Villains, Corody, &c.

Hereditaments, which concern the *Person*, are meerly of Persons themselves, or by Reason of Persons.

Of Persons themselves, as a Villain^m.

All^a that the Villain hath, as Land, Rent, &c. but not Choses in Action, as an Obligation, Debt, Covenants, or Warranty made to him, shall go to the Lord, if he^b claimeth it. But the Wife that the Villain marries after this Purchase of Land, and before the Entry of the Lord shall be endowed^c; and if he makes a Feoffment before the Lord enters, the Feoffee shall hold it. Also the Executors shall have the Goods not claimed by the Lord in his Life-Time. (Co. Litt. 118. b.)

Statutes.

Vide^d 19 H. 7. cap. 15. §. 5. *Cestuy que Use, being a Bondman, the Land may be seized by his Lord.*

Now if the Lord give him any Thing, so that he enables him to take an Interest against his Lord, this is an Infranchisement^e, as if he grant to him an Annuity, or makes an Obligation to him, or a Lease for Years, or a Feoffment of any Land by Deed, or without Deed, and whether the same be in Fee-Simple, Fee-Tail, or for Life. But a Lease at Will to a Villain is no Infranchisement, for he hath not any Interest of his Estate, for the Lord may oust him when he will.

Statutes.

9 R. 2. cap. 2. *'Where the Villain sues his Lord,*

^m Note that Villenage is abolish'd by 12 Car. 2. c. 24.

^a 22 Aff. pl. 37.

^b 3 H. 4. 15.

^c 19 Ed. 2. Fitz.

Dower, 171. Fleta, Lib. 13. pl. 3. Littlet. §. 177. Dr. & Stud.

l. 1. c. 8.

^d Co. Litt. 117. a.

^e 11 H. 7. 13.

Littlet. 205, 206, 207.

^f Vide Litt. §. 193.

the

PREROGATIVE,

The Lord may not seize his Villain in the Presence of the King. 27 Aff. pl. 49. Bro. Villain, 38. 2 Rol Abr. 737. Plowd. 322, 323. Co. Littlet. 137. b.

[b]

the Lords shall not be fore-barred of their Villain by reason of their Answer in Law.

His Children are also Villains, ^h and if one confess himself a Villain in a Court of Record, the Issues which he had before are free, but those born afterwards are Villains.

By reason of Persons, are

1. *A Corody*, which is a Portion for the Maintenance of some one, be it ⁱ Bread, Beer, Herring, an annual Robe, or Money to buy a Robe. So of a Chamber, or a Stable for my Horse ^k, when this is coupled with other Things, as with certain Messes of Flesh, Bread, Beer, &c. but a Chamber, or a Stable of themselves, do not make a Corody. And in the first Case they pass without Livery and Seizin, but not in the other.

2. *Offices*, which are *not to be exercised in Land*^l, as the Office to be my Faulconer, or Master of my Horse, or the like.

[38]

CHAP. VIII*.

Of FRANCHISES.

BESIDES the above Hereditaments, there are others derived out of the Regal Power of the King, which are called Franchises. For all Franchises are derived from the Crown, and therefore are extinguished, if they come to the Crown again, by Escheat, Forfeiture, or the like, for the greater drownes the less ^m.

A Franchise is a Royal Privilege in the Hands of a Subject.

And it is forfeited by *Misuser* thereof, ⁿ as to keep a Fair or Market upon Monday, when Tuesday is granted, or upon two Days, when he hath but one

^s Vide Fleta, l. 1. c. 3. pl. 2. 18 Ed. 4. 30. ^h 19 H. 6. 32. b. Littlet. §. 176. Hobart, 99. ⁱ 28 Aff. pl. 7. ^k 31 H. 6. 15. Fitz. Affize, 16. ^l Manxel's Case 2. Plowd. 2. Co. Litt. 20. a. ^m 15 Ed. 4. 7. 6 Ed. 3. 32. per Dyer, 44. pl. 32. Plowd. 219. Kelwey, 138. a. 147. b. ⁿ 22 Aff. pl. 34.

granted

granted to him, is a Forfeiture of the whole, for it is a Misuser; but to keep a Market on Monday and Tuesday when only Tuesday is granted, is only a Forfeiture of that Day which is usurped above what is granted. To claim a Fair, &c. for two Days by Patent, when only one Day is granted, is a Forfeiture of both^p. But if he claims one by Patent, and another by Prescription, and the last is found against him, yet he shall forfeit that Day only^p. Misuser of any Point, where there is many in one Franchise, is a Forfeiture of the whole; but not where the Franchises are several^q. But Nonuser of a Market, is not a Forfeiture of it, as it is of the Office of Clerk of the Market, and the like, which of Necessity ought to be used.

Such are every Liberty or Commodity, which having their Creation at first by special Grant of the King, or of their Nature appertaining to him, are given to a common Person to have in them some Estate of Inheritance, or for Life, &c.

Hereof some are more Royal than others; as

The Principality of Wales.

Counties Palatine.

Authority to pardon Treason, Murder, Felony, or Outlawry for any such Offences; To make Justices in Eyre, Justices of Assize; Justices of Goal Delivery, Justices of the Peace, or the like.

Statutes.

27 H. 8. cap. 24. *No Subject shall have Authority to pardon Felony, Outlawry for Felony, nor to make Justices in Eyre, Assize, Peace, or Goal Delivery.*

All original Writs, Indictment of Treason, Felony, Tresp[ass], and Process thereupon, shall be only in the Name of the King: And the Teste in the Name of him who hath the Franchise. [b]

Every Writ and Indictment contra pacem, shall be contra pacem of the King only, and not of any Subject.

The King shall have all Fines, Issues, Amercements, and Forfeitures lost by any Stewards, Bailiffs, or other Officers of a Franchise, for Non-Execution, Mis-Execu-

^p 2 H. 7. 11. b.

^q 22 Aff. pl 34.

^r 2 H. 7. 11. b.

tion,

tion, Insufficient Return of Process, or for any Misdemeanor concerning their Office.

See many Provisos in the same Statute.

Of the others which are *less Royal* (being almost infinite) some few, whereof mention is most frequently made in our Books, here follow.

1. *Corporations* to endure in perpetual Succession^r, as a Mayor and Commonalty, and many others, which the King maketh, or may make every Day, and are for the most part aggregate of many Persons. Succession in these amounts to the same, as Heir in the Case of a single Person^s, that is to say, a Gift to a Mayor and Commonalty, without saying (and to their Successors) is a Fee-Simple, and although it be given to them for their Lives, for they are void Words. And colour in an Action of Trespass, shall not be given to such a Corporation by a Lease for Life, for being a Body Politic, which never dies, they may not have such Estate^t.

Statutes.

Vide Statutes of Mortmain hereafter.

Vide 33 H. 8. cap. 27. *All Statutes made by any Founder of a Corporation, upon the Foundation thereof, by which the Grant, Lease, Gift, or Election of the Governor, with the Assent of the greater Part of the Corporation, having a Voice, shall be hindered by the lesser Number, contrary to the course of the Common Law, shall be void.*

Vide 19 H. 7. cap. 7. *Fraternities shall not make, nor execute Ordinances by them made, if they be not examined and approved of by the Chancellor, Treasurer, or Chief Justices, or three of them, or before the Justices of Assize.*

They shall not make Ordinances to restrain any Person from suing to the King, or any of his Courts.

[39] 2. *Boroughs*, that is, "many ancient Towns so incorporated with Power to hold Plea by Writ of *ex gravi querelâ*, or the like: From whence come Burgeses

^r 14 H. 8. 3. Fineux.
4. 61.

^s 27 H. 8. 15.
^t 40 Aff. pl. 27, 41. Littlet. §. 164.

^t 21 Ed.

to Parliament: and this makes the Difference^a between a Borough and a Town. So that upland Towns, that are not ruled and governed as a Borough is, are called Towns, altho' they are enclosed with Walls, as Ludlow, and the like. And every^b Borough is a Town, but not *e converso*. The Names of all the Towns in England, and which are so incorporated, and which not, are of Record in the Exchequer.

3. *Chases, Parks, Warrens.*

4. *Fairs, Markets, Toll*^c to be had of every one who buys any Thing in a Fair or Market, for the Thing which he buys there, except it be for his own^d Expence, for the^e Seller shall not pay Toll, but the Buyer, and Toll^f shall not be paid for all Things brought to a Fair, but for those which are sold there; but by Custom, a Man shall pay Toll for every Thing that he brings to a Fair, and for his Standing also.

5. *To be exempt from serving on Juries*^g.

Statutes.

Marlbridge, cap. 14. *Although a Man hath Exemption from the King, that he shall not be put upon an Inquest, yet in Cases of Necessity, he shall be put on an Inquest, as in the Grand Assize, Perambulation and Attaint.*

6. *Cognizance of Pleas* out of the King's Court; which does not lie in Prescription, but in Demand; and is always of Record^h.

7. *To hold Pleas* in his own Court in such a Place before his Bailiff. And in this a Man may prescribeⁱ.

8. *Court-Leet.*

9. *Hundred-Court.* For both these, see Postea 132.

^a Vide Co. Litt. 110. b.

^b Littlet. §. 171.

^c 9 H.

6. 45. Vid. Mirrour, cap. 1. §. 3. fo. 4.

^d 28 Aff. pl. 53.

2 Rol. Abr. 523.

^e 2 Inst. 221.

^f 9 H. 6. 45.

2 Inst. 221.

^g 12 Ed. 4. 18.

^h 9 H. 7. 11. b.

Co.

Litt. 114. a. b.

ⁱ 9 H. 7. 11. b. Co. Litt. 114. b.

CHAP. IX*.

Of Charges in the Realty.

SUCH are Hereditaments themselves. *Charges* and *Torts*, which concern them, viz. in the Realty, here follow.

[b] *Real Charges*, are such as may be of an Estate of Inheritance, for Life, or Years. As Warranty and Acquittal, which are meerly Real, and Annuity^k which is mixed in the Realty.

Warranty, is when a Thing concerning an Estate of Inheritance, or for Life, is warranted. And^a the Word *Warrantizabimus* only makes a Warranty; and not *Defendemus*. And if a Lease for Years be made with Warranty, this sounds not in Nature of a Warranty, but of a Covenant, because that it is a Chattel, and if the Lessee be ousted, yet he may have an Action of Covenant; but where a Fee or Freehold is warranted, the Party shall not have any Advantage, except that he be Ter-tenant^b.

Statutes.

Statute de Bigamis, cap. 6. *Dedi et concessi with a Reservation of Service, shall bind the Heir to Warranty. But without any Reservation of Service, or without Clause of Warranty that makes express mention of the Heir, the Heir shall not be bound; but the Feoffee himself during his Life is bound.*

Every^d Exchange is a Warranty in Law; so that he, who takes in Exchange, or his Heirs, may vouch to Warranty by an Exchange without Deed; and his Assignees shall also rebut.

Acquittal^e, is when a Man grants to acquit the Tenant of every manner of Service against the Lord Paramount.

Owelty^f of Services, that is to say, when a Man

^k Fitz. Release, 48.

^a Little. §. 733.

^b 26 H. 8.

3. b.

^d 45 Ed. 3. 20. Co. Litt. 366. a.

⁴ Co. 121. a.

³ Ed. 3. It North. Fitz. Formed, 44.

^e F. N. B. 136. b.

^f 4 H. 6. 28. 4. Ed. 4. 35. F. N. B. 136. b. f.

holdeth over by the same Services, or less than the Tenant holdeth of him (as if he holdeth himself by 20 s. and another holdeth of him by 30 s.) and Frank-Marriage *, until the fourth Degree be past, draws in Law an Acquittal. For the Donees in Frank-Marriage, shall hold free until the fourth Degree be past, and may have a Writ of *Mesne*.

When the Tenant and his Ancestors, whose Heir he is, have holden by Homage of the Lord and his Ancestors, whose Heir the Lord is, for Time whereof, &c. and the Lord hath received Homage, the which is called *Homage Auncestrell*, (for the Alienee ^e of the Tenant by *Homage Auncestrell* holdeth not by *Homage Auncestrell*, nor is the Lord bound to Warrant to him, because the Continuance of the Tenancy in the Tenant is interrupted; in the same manner, if the Tenant by *Homage Auncestrell* alien in Fee, and takes back, the Warranty is gone; And if the Lord ^b by *Homage Auncestrell*, grant over his Seignior, the Tenant needs not to attorn, except that the Grantee will Warrant the Land to him and his Heirs, for otherwise his Warranty should be lost, because by Attornment the *Homage Auncestrell* is destroyed) this doth ⁱ bind the Lord to Warrant the Land to the Tenant, and to acquit him of all Services against the Lord Paramount. For which the Tenant may have a Writ of *Mesne*. But if the Lord ^k hath not received Homage, he is not bound thereunto.

And therefore such Tenant may compell his Lord to receive Homage, viz. by a Writ *de Homagio capiendo* ^l.

Annuity ^m is an annual Rent to be had of the Person of the Grantor; as where an Annuity is granted, or a Rent out of his Coffers, or out of the Land without more saying. But if the Deed be ⁿ, that if the

[40]

* Littell. §. 19. 12 H. 4. 9. F. N. B. 136. ^e Littell. §. 147.

^b 18 H. 6. 2. b. per Newton. Co. Litt. 101. a. 320. b. ⁱ F. N. B.

136. d. 45 Ed. 3. 23. 11 H. 4. 52. Littell. §. 144. Co. Litt. 384. a.

^k Co. Litt. 101. a. 45 Ed. 3. 23. ^l Bracton, lib. 2 fo. 83.

Britt. 172. 3. 47 H. 3. Garranty 99. Appendix Regist. fo. 6.

^m Co. Litt. 144. b. F. N. B. 152. a. Dr. & Stud. l. 1. c. 30.

ⁿ Litt. §. 221.

Grantee be not annually paid 10 s. at Easter, he may distrain for it in the Manor of D. this is a Rent Charge (for the Manor of D. is charged with a Distress) but not an Annuity, neither is the Person of the Grantor charged, because he doth not grant any Rent, but only that the Grantee may distrain. So if by expresse Words he inserts in the Deed of Grant of a Rent-Charge a Proviso^o, that it shall not extend to Charge my Person by a Writ of Annuity, &c.

CHAP. X.

Of Torts in the Realty.

TORTS in the Realty, are to the Freehold, or Discontinuance, and Deforcement.

To the Freehold, are Abatement and Intrusion, (both to a Freehold in Law) or Disseizin.

Abatement^a, is when a Stranger enters, and so abates upon him who ought to have the Land, after the Death of him who hath the Inheritance, whether the Land come by Descent, or the Person die without Heir.

Intrusion^b, is when he enters after the Death of Tenant for Life, whether he be Tenant for his own Life, or for another's Life, Tenant in Dower, or by the Curtesy.

Disseizin^c, is when a Man is ousted of his Freehold in Deed; which may be of^d every Rent, or other Profit, by disturbing him who hath the same, in the means to come to it; as an Encloser and Forestaller in any Rent, be it Rent-Service, Rent-Charge, Rent-Seck.

Encloser, is when the Tenant incloses the Land, so that he who hath the Rent out of it, may not come

^o Littlet. §. 220. ^a 5 H. 7. 6. Co. Litt. 277. a. ^b Old N. B. 135. b. F. N. B. 203. e. Fleta, lib. 4. c. 30. pl. 2. Co. Litt. 277. a. ^c Littlet. §. 279. Bract. lib. 4. fo. 161, 162, 204. Britton, c. 42, 43. Co. Litt. 153. b. 277. ^d Litt. 233, 243. 36 Aff. 7. Bro. Disseizin, 57. 49 Aff. pl. 5. Ibid. 86.

to distrain or demand it. But if it be a Park^e, or the like, which of ancient Time has been enclosed, so that it be not with Purpose to disturb him of his Rent, this is not any Disseizin.

Forestaller, is when he is going to the Land to distrain for the Rent in Arrear, and the Tenant seeing him, stoppeth the Way with Force and Arms; of the same Nature it is also, if the Tenant menace him in such manner, that he dare not come to distrain for fear of some Damage to his Person, as Death, or maiming of his Limbs, or the like.

In Rent-Service and Rent-Charge, Rescous and Replevin^a. [b]

Rescous, when the Party having distrained, the Distress is rescued, or being upon the Land to distrain, may not be let to do it.

Replevin is, when an Action of Replevin is brought upon the Distress taken.

^b In a Rent-Charge and Rent-Seek, Denial.

Denial, is when the Rent (being demanded^c upon the Land) is not paid.

Of this Nature is a Nuisance, by which the Freehold of another is impaired. For^d where my Freehold is estopped, as a Way, by building a Mill, or the like, Assize of Nuisance lies; but for straitning of a Way, only Action on the Case. And^e Tenant for Years shall not have an Assize of Nuisance, but he may enter and abate it.

The^f dying seized of the Inheritance and Freehold together, be it by Disseizin, Abatement, or Intrusion, (not of the Freehold only^g, as of an Estate for one's own Life, or the Life of another, nor of^h a Remainder or Reversion, where the Freehold is out of him) by which the Land descends to his Heir, (for if it escheatⁱ, as where the Alienee of the Disseizor dies without Heir, the Disseizor may enter) this takes away the

^a Vide 49 Aff. pl. 6. Ibid. 87. Bon. Case. ^a Littlet. §. 237, 238. Bro. Disseizin, 102. ^b Littlet. 233, 238. ^c Co. Litt. 153. b. Vid. 14 Ed. 4. 4. Bro. Disseizin, 68. ^d 22 H. 6. 15. 33 H. 6. 26. ^e F. N. B. 184. g. Post 99. b. ^f Littlet. §. 385. ^g Ibid. 387. ^h Ibid. 388. ⁱ Ibid. 390.

Entry of every one (whence it is called a Descent which tolls Entry) that hath Title after his Death; whether it be that he hath Right, as where a Disseizor^k, Abator, or Intruder dies seized, or that he hath but a Title, as an Infant^l, who makes a Feoffment, and after his full Age, the Feoffee dies seized; or as he in^m Reversion, where Tenant for Life aliens, and the Alienee dies seized; or the Deviseeⁿ of Land in London, where the Heir enters and dies seized; for the Infant may have a *Dum fuit infra ætatem*; he in Reversion a *Consimili Casu*; and the Devisee^{*} an *Ex gravi querela*. But if the Disseizor^o of Feoffee upon Condition, or Alienee^p in Mortmain, dies seized, or if a Man^q devise that J. S. shall sell his Land in London, &c. and the Heir is disseized, or make a Feoffment, and the Disseizor or Feoffee die seized, yet the Feoffor upon Condition in the first Case, the Lord of whom the Land is holden in the second Case, and J. S. in the last Case, may enter notwithstanding a Descent, for they have no other Remedy.

But Claim^r within a Year before his Death (which is called continual Claim) saves the Entry. And^s this Claim ought to be made upon the Land; but if he dare not come there for fear of Battery, Maihem, or Death, then as near to the Land, as he dare for such Fear.

Statutes.

- [41] 32 H. 8. cap. 33: *The dying seized of a Disseizor with^t force, who hath no Title or Right, shall not be any Descent to take away the Entry of him, or his Heirs, who at the Time of the Descent, had good Title of Entry; except that such Disseizor have had peaceable Possession for five Years next after the Disseizin, without Entry or Claim.*

^k Plowd. 47. ^l Littlet. ^m 21 H. 6. 17. ⁿ 9 H. 6. 25. Co. Littet. 240. b. contra. Cro. Car. 200, 201. ^{*} Co. Litt. 111. a. Terms de Ley. Ad. V. Devise. ^o 21 H. 6. 17. 33 H. 6. pl. 11. Littlet. §. 391. 2. ^p 47 Ed. 3. 11. Bro. Mortmain, 6. 21 Ed. 3. 17. Co. Litt. 240. b. ^q 1 Ed. 6. Bro. Devise, 36. ^r Littlet. §. 422. ^s Ibid. 419, 421. ^t Vide Dyer, 219. pl. 7. a good Case upon this Statute.

Such

Such are Torts to the Freehold. Discontinuance and Deforcement now follow.

Discontinuance, is when by the making of a larger Estate than he may, he devests the Inheritance out of another Man: As by a Fine, or a Lease for Life of the Lessee, or a Gift in Tail, or a Feoffment in Fee made by Tenant in Tail, Lessee for Life, or the like^u; but a Grant^b of Rent, a Release^c, or Confirmation made by them in Fee, doth not make a Discontinuance, inasmuch as it is without Livery; and therefore by these no greater Estate shall pass, than what the Grantor may lawfully make.

If he be a Termor for Life or Years, this is a Forfeiture of his Estate, for which he, to whom, &c. may enter^d. As if Lessee for Life, or Years of Land makes a Feoffment in Fee; for hereby the Fee-Simple passeth by reason of the Livery. Otherwise it is^e where Tenant for Life of a Reversion or Rent grants it by his Deed in Fee, or if Tenant for Life^f takes a Fine of a Stranger, *sur consance de droit*, or upon a Release, for such Fine shall not encrease his Estate. But^g where Tenant for Life levies a Fine to a Stranger *sur consance de droit come ceo que il ad de son done*, this is a Forfeiture. So if Tenant for Life^h, prays in Aid of a Stranger, or (inⁱ a Writ of Right against him) joins the Mise upon the meer Right; and these are by Reason of Estoppel.

Prerogative,

If he^k who holds in *Capite* aliens, the Freehold without License, he shall forfeit the Land.

Statutes.

Prerogativa Regis, cap. 6. *Tenant in Capite by Knight's Service, may not alien the nine Parts of his Land, so that the Residue thereof be not sufficient to do his Service, except he have the King's License.*

^u Littlet. §. 595, 6, 7, 630. 3 Co. 85. b. Co. Litt. 252. a.

^b Littlet. 616, 618. 3 Co. 85. b. ^c Co. Litt. 328. Litt.

606, 607, 608, 612. Co. Litt. 251. b. ^d Co. Litt. 251. a.

b. 252. a. 356. a. Littlet. 611. ^e Ibid. 615, 616. 2 H.

5. 7. Bro. Forfeiture, 96. Fundamenta legum. Co. Litt. 251.

^f 1 H. 7. 22. Co. Litt. 252. a. contra. ^g 42 Ed. 3. 20.

Co. Litt. 251. b. ^h 9 H. 7. 20. Co. Litt. 252. a.

ⁱ 9 H. 5. 14. Co. Litt. 251. b. ^k 14 Ed. 3. Fitz. Q.

Imped. 54.

Prerogativa Regis, cap. 7. *Of Serjeants aliened without License, the King hath used to rate them at a reasonable Extent.*

1 Ed. 3. cap. 12. *The King shall not seize as forfeited Lands in Capite, that are aliened without License, but he shall have a Fine.*

If he be Tenant in Fee Simple in the Right of another, or Tenant in Tail, after the Statute of Westminster 2. (the which is most properly termed a Discontinuance) this takes away the Entry of all that have Title after his Death; as ¹ where a Husband seized in Right of his Wife, a Dean ^m Sole seized in Right of his Deanery, Dean and Chapter, Warden and Chaplains, Mayor and Commonalty, seized of Lands in Right of their Corporation, make a Discontinuance.

Statutes.

[b] 32 H. 8. cap. 28. *A Fine, Feoffment, or the like, by the Husband alone, of Land being the Inheritance or Freehold of the Wife, shall not make a Discontinuance.*

34 & 35 H. 8. cap. 22. *Feoffments, Deeds inrolled, and Releases acknowledged before a Mayor, or the like Incorporations, shall be of the same force, as if the Statute of 32 H. 8. had not been made.*

A Warranty, which enures upon a larger Estate than the Party is enabled to make, works a Discontinuance, altho' it be of Rent, or the like. As if Tenant in Tail of an Advowson in gross, suffer an Usurpation by six Months, the Release of a collateral Ancestor with Warranty, is a Discontinuance, for he has a Fee by the Usurpation ^a. Same Law ^b seems of a Release of a collateral Ancestor with Warranty to the Grantee in Fee of a Rent, or Advowson in Gross, by Tenant in Tail; but if ^c Tenant in Tail of a Rent, or Advowson in Gross, grant this in Fee with Warranty, this is no Discontinuance, but at the Will of the Issue.

¹ Littlel. 594. ^m 21 Ed. 4. 86. Vide Co. Litt. 325. b. Bro. Discontinuance, 22. ^a 21 H. 7. 39. b. ^b 21 H. 7. 40. Vavasor. Bro. Discontin. 34. ^c Co. Litt. 332. b. 33 Ed. 3. Fitz. Formedon, 47. 21 H. 7. 9, 40. 43 Ed. 3. 26. Bro. Discontin. 9. 48 Ed. 3. 9. Ibid. 25. 15 Ed. 4. 6. Ibid. 6. 13 H. 7. 10.

If he, whose Entry is taken away by Descent or Discontinuance, hath the Freehold cast upon him by a new Title, he shall be in of his elder Title, which is termed a Remitter: As ^d if the Heir of the Disseizor (in by Descent) makes a Lease for Life to J. S. Remainder for Life or in Fee to the Disseizee; if Tenant in Tail discontinue, ^e and after disseize the Discontinuee, and die seized, whereby the Land descends to his Issue; if the ^f Husband makes a Feoffment in Fee of Land in Right of his Wife, and takes back an Estate in Fee to him and his Wife; in these Cases the Disseizee, after the Death of J. S. the Issue in Tail, and the Wife, if she survive her Husband, is remitted; but if the Husband survive, the Heir of the Wife is not remitted, for there is another Tenant of the Freehold against whom he may sue: And in the Case of the Tenant in Tail before, altho' the Heir of the Discontinuee was within Age at the Time of the Descent to the Issue in Tail, yet his Entry is taken away for ever, because that the Issue is remitted.

Such are Torts to the Freehold. *Deforcement* is, ^h when a Man, whether he comes in at first lawfully or not, holdeth himself in without Right, as Tenant *pur auter vie*, or for Years, who holdeth over his Term: For a ⁱ Writ of *Ad Terminum qui præterit* lies against him, which proves that he is a Deforceor; and in every *Præcipe in Capite* or *Formedon*, which is a Writ of Right in its Nature, the Writ shall say, *Whereof he unjustly deforces him*; so it is in a Writ of Entry in the *Post*. And this is intended of him who holdeth in after his Term is expired, and before any Entry made upon him: For if he occupy against the Will of the Lessor, he is a Disseizor ^k.

^d Littlet. 683. ^e 11 Ed. 4. 1. ^f Littlet. 659. ^g 21 Ed. 3. 26.
^h 7 Ed. 4. 6. ⁱ Co. Litt. 277. b. ^j F. N. B. 201. d.
^k Plowd. 139. ^l 27 H. 8. 17. Per Fitzherbert.

[42]

CHAP. XI.

Of Chattels real.

THUS much concerning Hereditaments. *Chattels*^a are Possessions in which a Man hath no Estate of Inheritance, or for Life; and are *real* or *personal*. *Real*, as Wardship, and all Estates which are not of an Estate of Inheritance or for Life.

Wardship is an Interest in the Custody of the Body or Land, or both, of an Heir being within Age.

This the Lord,^b of whom the Land is holden in Chivalry, shall have to his own Use^c, and for this Reason his Executor also shall have it until the Age of 21 Years of the Male (so^d that if the Lord marry a Male that is in Ward, before the Age of 21 Years, yet he shall be in Ward for the Land until that Age) and the Age of 14^e of the Female.

Statutes.

Vide Magna Charta, cap. 3. ^f *The Lord shall not have the Wardship of the Heir or his Land until he hath received his Homage.*

If the Heir in Ward be made a Knight, yet the Land shall remain in Ward until 21.

Vide Marlbridge, cap. 6. ⁱ *Where a Man infeoffes his Heir within Age, to defraud the Lord of the Ward, yet the Lord shall have the Ward.*

So upon a fraudulent Feoffment upon condition to revert to him or his Heirs after a certain Term, if a Sum of Money to the Value of the Land or more be not paid by the Feoffee; but in this Case the Lord shall only have a Writ of Ward against him, and notwithstanding the Recovery, yet the Action of the Feoffee is saved to him against the Heir at his full Age.

Vide 32 H. 8. cap. 1. of *Devises*, hereafter fo. 47. a.

Vide Marlbridge, cap. 16. ^k *The Heir shall have a Mortdancesthor against his Lord who will not deliver to him*

^a Co. Litt. 42. a. 118. b.

^b Littlet. §. 103.

^c Littlet.

§. 125.

^d Bro. Gard. 111.

^e Fitz Gard. 67.

6 Co. 71.

^f Vide Fleta, lib. 1. c. 9. pl. 3.

ⁱ Fleta, lib. 1. cap. 11. pl. 11.

^k Fleta, lib. 1. cap. 11. pl. 14.

his Inheritance at his full Age, and shall recover Damages from the Time of his full Age: And if the Lord enter, the Heir being of full Age at the Death of his Ancestor, he shall recover Damages against him in a Mortdancestor or Cousinage, as the Case is.

Vide Westminster 1. cap. 48. ¹ *If the chief Lord or other Guardian infeoffe any one of the Lands which he has in Wardship, the Infant shall presently have an Assize of novel Disseizin against him and against the Feoffee; and the chief Lord or Guardian shall lose the Ward and all the Residue of the Inheritance that they hold in Name of the Heir.* [b]

One of the Prochein Amies who will, may sue for him.

Vide Westminster 2. cap. 4. ^m *Where a Woman who hath not Right recovers Dower against the Guardian, the Heir at his full Age shall have a Mortdancestor against the Woman.*

Vide Magna Charta, cap. 4. *Guardian shall not make Waste of Men or Things, upon Pain to lose the Ward.*

Vide Magna Charta, cap. 5. ^o *He shall keep in repair the Houses, &c. of the Issues of the Land, and shall render it to the Heir at his full Age, stocked as he received it.*

Vide Westminster 1. cap. 21. *confirms Magna Charta, cap. 4.*

Vide Gloucester, cap. 5. ^p *If Guardian commit Waste, he shall render to the Heir the Damages of the Waste, if so be that the Wardship lost doth not suffice to the whole Value of the Damages before the full Age of the Heir.*

Vide Magna Charta, cap. 4. *If the Committee of the King of Land in Ward doth Waste, the Land shall be committed to others: If the Grantee of the King doth Waste, he shall lose the Ward.*

Vide Articuli super Chartas cap. 18. *Upon Waste done in Wardships by any Escheator or Sub-Escheator, he that shall receive the Damage may have a Writ of Waste, and recover Damages.*

Vide 36 Ed. 3. cap. 13. *The Heir shall have a Writ of Waste against the Escheator, as well within Age as at*

¹ Fleta, lib. 1. cap. 12. pl. 4.

23. ^o Fleta, lib. 1. cap. 12. pl. 1.

^m Fleta, lib. 5. cap. 23. pl.

^p Ibid. pl. 5.

full Age; and his Friends, as long as he is within Age, shall have the Suit for him.

Vide 14 Ed. 3. cap. 13. *The Heir, when he cometh to his full Age, shall have an Action of Waste against Guardians and Farmers to whom the King shall let the Land in Ward, according to this Statute.*

☞ But note, that this part of the Statute, as to the letting or demising the Land, is altered by the 32 H. 8. cap. 46. *The Erection of the Court of Wards.*

Prerogative.

Upon ^a a Tenure by Knight's-service in Capite, the King shall have the Wardship of all the other Lands also, whereof the Tenant died seized in his Demesne, as of Fee the Day that he died, of whomsoever he held the same.

Statutes.

[43] *Prerogativa Regis, cap. 1. accords herewith, except as to the Fees of the Archbishop of Canterbury, Bishop of Durham between the Time and Tese, the Earls and Barons of the Marches.*

Vide Magna Charta, cap. 27. *The King shall not have the Wardship of Land holden of others in Soccage, by reason of a Tenancy in Fee-farm, or Soccage, or Burgage; nor shall he have the Wardship of the Land itself holden in Fee-farm, or Soccage, or Burgage, if the Fee-farm is not in Chivalry. The King shall not have the Wardship of the Heir or Land holden of another in Chivalry, by reason of Petit-Serjeanty.*

Prerogativa Regis, cap. 4. The King shall assign to the Widows of Tenants in Capite their Dower, altho' the Heir be of full Age, if the Widows will.

The King ^r shall have to his own Use (and therefore may lease rendring Rent) all the Possessions of a Fool ^s Natural (not of any other Ideot) during ^t his Ideocy.

But not ^v that to which the Fool hath Title of Entry or Action; and for this Cause, upon Office found that

^a 9 H. 3. Fitz. Prerogative, 25. ² H. 3. Ibid. 26. Fleta, lib. 1. cap. 11. pl. 2. Prerog. Regis, cap. 1. 24 Ed. 3. Fitz. Prerogative, 22. Kelwey, 86. a. Dyer, 174. pl. 20. ^r Fleta, lib. 1. cap. 11. pl. 10. 31 Ed. 3. Fitz. Saver default, 37. ^s 18 Ed. 3. Fitz. Scire Facias, 10. ^t Stamf. Prerog. 34. ^v 1 H. 7. 24.

the Ancestor of the Ideot died seized of Estate Tail, it suffices to traverse the dying seized, for this alone entitles the King.

Statutes.

Prerogativa Regis, cap. 9. *The King shall have the Custody of their Lands in taking the Issues, without Waste or Destruction, and shall find them Necessaries, and after their Death shall render it to their Heirs.*

Vide 32 H. 8. cap. 46. *That Ideots and their Land are within the Survey of the Court of Wards.*

Prerogativa Regis, cap. 10. *The King shall provide for Lunatics that their Lands shall be kept without Waste and Destruction, and to their Use, and the King shall take nothing of the Issues to his own Use.*

Guardian in Chivalry that hath the Custody of Land, shall not have Relief; and if a Man hold * of several common Persons by Knight's-service, the Lords by Posteriority shall not have Relief, because they are to have the Wardship of the Land holden of them, altho' the Lord by Priority ^y only shall have the Wardship of the Body; but if in this Case any of the Land ^z be holden by Knight's Service in Capite, the Heir at his full Age shall pay Relief to all the other Lords, for there the King hath the Wardship of all the Lands.

The * Custody of the Body draws to the Lord in Chivalry the Marriage of the Ward, as a Thing which of mere Right belongs to him; and this whether he will be married by the Lord or not.

Statutes.

Magna Charta, cap. 6. *Heirs shall be married without Disparagement.*

Vide Merton, cap. 6. ^a *The Lord who marries the Heir in Ward within the Age of Fourteen to Villains, or others, as Burgesses, where they be disparaged, shall lose the Wardship, if the Parents complain.* [b]

Vide Merton, cap. 6. ^b *If the Heir above Fourteen until his full Age marry without the Agreement of his Lord,*

* Old N. B. per Bro. Relief, 13. ^y Westm. 2. c. 16. ^z Fleta, supra. 24 Ed. 3. 24. 26 H. 8. 8. Bro. Relief, 1. Co. Litt. 83. 2 Cro. 28. 3 Cro. 534. * 2 H. 7. 9. 5 Co. 126. b. ^a Fleta, lib. 1. cap. 13. pl. 2. ^b Ibid. pl. 9.

who offers to him a suitable Marriage without Disparagement, the Lord shall hold the Land beyond his Age of Twenty One Years, so long that he may receive the double Value of the Marriage.

Vide Merton, cap. 7. *The Heir shall agree with his Lord for the Value of the Marriage, before that he shall have his Land.*

Vide Westminster 1. cap. 22, *Of Heirs Female the Lord may not hold by Reason of Marriage their Lands above two Years after Fourteen. And if he will not marry them within the two Years, then they shall have an Action to recover their Heritage quit, without giving any thing for their Wardship or their Marriage.*

If they will not be married by their Lord (where they be not disparaged), then their Lords shall hold the Land until their Age of Twenty one Years, and further, until they have taken the Value of the Marriage.

Prerogativa Regis, cap. 6. *An Heir Female within Age of Consent, that is married in the Life of the Ancestor, shall be in Ward to the King until her Age of Consent.*

The ^c eldest Son or Daughter, being Heir apparent to the Father, shall not be in Ward for his Body in the Life of the Father. But if ^e one having a Son takes a Wife seized in Fee of Land holden in Chivalry, and hath another Son by her, and afterwards the Wife dies, this second Son shall be in Ward during the Life of his Father, except the Husband be intituled to be Tenant by the Curtesy.

Where a Man holdeth ^g several Lands of several Lords by Knight's-service, that Lord of whom the Tenant first held shall have the Wardship of the Body: This is called a Seignior by *Priority*, and the other by *Posteriority*.

That

PREROGATIVE.

The King shall have the Wardship of the Body, altho' the Tenure of him be by Posteriority; but so shall not his Grantee of the Seignior have. Fleta, lib. 1. cap. 13. pl. 5. 12. Ed. 3. Fitz. Prerog. 23. F. N. B. 142. f. Plowd. 240. 2 Inst. 391.

STATUTES.

^c Ibid. pl. 10. ^d 6 Co. 22. b. This Statute is but in Affirmance of the Common Law, and the Law is all one in the Case of a common Person. ⁷ H. 6. 10. b. That it extends to Heirs Males also. ^e 33 H. 6. 55. b. Littlel. §. 114. ^f F. N. B. 143. l. ^g Westm. 2. c. 16. Fleta, lib. 1. cap. 13. pl. 7. F. N. B. 142. f.

STATUTES.

Prerogativa Regis, cap. 2. accord.

That ^b which makes the Priority is the Feoffment; for the Pleading is, ⁱ *That he holdeth this Land of him by a more ancient Feoffment, than he holdeth the other Land of the other*; and therefore ^k if Tenant of Lands holden by Priority makes a Feoffment in Fee, and takes back an Estate in Fee, this Land shall be holden by *Posteriority*; but if the Lord by Priority grant his Seigniority in Fee, yet the Tenure shall be of the Grantee by Priority. So altho' the Grantor takes back an Estate of the Seigniority in Fee. [44]

Statutes.

Westminster 2. cap. 16. ^a *Where Land in Chivalry descends on the Part of the Father and other Land (holden of another Lord) on the Part of the Mother, that Lord of whom the Ancestor held by the more ancient Feoffment, shall have the Marriage without respect to Sex, or to the Quantity of Feoffment.*

A Woman shall be ^b barred of Dower (as well Dower *ex c assensu Patris*, or *ad ostium Ecclesie*, as of the third Part ^c at the common Law, by Detainment of the Heir, but in pleading ^f she shall shew the Name of the Heir, and if he be Male or Female.

In Soccage, ^g the next of Blood to whom the Inheritance may not descend, shall have the Wardship, as if the Land descends on the part of the Father, then the Mother, or next of her Blood, shall have it, *Et e converso*, until Fourteen Years of Age of the Heir, and to the Use of the Heir himself; and the Lord shall not have it. And therefore such Guardian ^h shall render an Account to the Heir, at his ⁱ full Age, of the Issues and Profits of the Land, and of the Value of his Marriage, if he marry him within Fourteen Years of Age. And if he die befo^e the Heir cometh to the Age of

^b F. N. B. 142. ⁱ Rast. Entr. 387. b. pl. 6. ³ Ed. 3. Gard. 19. ¹¹ Ed. 3. Ibid. 115. ²¹ Ed. 3. 41. ^k F. N. B. ibid. ^a Fleta, lib. 1. cap. 13. pl. 11. ² Inst. 391. ^b Co. Litt. 39. a. 9 Co. 19. a. Doc. Pla. 149, 151. ^c 47 H. 3. Fitz. Dower, 174. ^d 11 H. 3. Ibid. 187. ^e 2 H. 7. 6. ^f 22 H. 6. 16. 2 H. 7. 6. ^g Dr. & Stud. 1. 1. c. 7. Fortescue de laudibus, &c. 44. Littlet. §. 123. ^h Ibid. ⁱ Vide Co. Litt. 89. a. Nota. ² Inst. 136.

Fourteen, yet his Executors shall ^k not have the Wardship, nor the Husband after the Death of his Wife, Guardian in Soccage. But if a Wife be Guardian in Soccage, and the Husband (or both by Indenture) lease the Land, yet after the Death of the Husband the Feme may enter; for inasmuch as she hath the same only to the Use and Benefit, and in Right of, the Heir, the ordering and Direction of the Land shall not be taken from her by any Act of her Husband.

Statutes.

28 Ed. 1. Stat. *De Wardis & Releviis. Where Relief shall be given, there Wardship is incident, and contrariwise. In Grand-Serjeanty Wardship and Relief are incident, but not in Petit-Serjeanty, nor in Fee-Soccage, but he shall double the Rent. The Wardship of Land holden in Chivalry belongs to the Lord until the Heir is Twenty one Years of Age, and also the Marriage. The Wardship of Land in Soccage which descends from the Mother, belongs to the next of the Blood of the Father, & e converso.*

All this is but in Affirmance of the Common Law.

Estates, which are not of Inheritance, nor for Life, are Leases for Years. or at Will.

[b] For Years, 'which is for a Time certain'; for the Commencement and Determination thereof ought to be certain. And therefore ^b a Lease for a Year, and so from Year to Year during the Life of J. S. is only a Lease for two Years. And a ^c Lease for a Year, and so from Year to Year, so long as it pleases the Parties, and he occupies by Force hereof for twenty Years, yet after the Expiration of the three first Years (at most) it is but a Lease at Will; for beyond that it hath

^k Littlet. §. 125. Plowd. 293. 4. Ante. 4. a. Co. Litt. 89. a. 351. a. ^a 14 H. 8. 10. Per Fitzherbert. Bro. Leases, 13. Bract. lib. 2. c. 9. Co. Litt. 45. b. 21 H. 7. 38. b. Plowd. 272. 6 Co. 35. a. Carter, 148. ^b Plowd. 273. ^c Potkin's Case. 14 H. 8. 10. b. 6 Co. 35. b. 1 Rol. Abr. 851. Salkeld. 413. pl. 2. Stomfil. v. Hicks. accord. Sed. Ib. pl. 4. & 414. pl. 6. the Case of Legg, v. Strudwick contra. And note well, that the Case of Legg v. Strudwick accords with the Opinions of Polard and Brudnell C. J. in 14. H. 8. 10. supra. Bro. Leases, 13. and also with the Opinion of Brook afterwards in Abridgement of S. C. Tit. Tenant per Copy 17. And see Noy's Max. 65. Ergo Quære de Hoc.

not any certain Continuance. Also ^d a Lease for so many Years, as Land in Execution upon a Statute Merchant shall be in Execution, is not good for the uncertainty: But a Lease ^e for so long as J. S. who is in Prison for hunting, shall be there by Order of Law, is good for two Years.

Therefore a Reversion and Remainder may also depend upon an Estate for Years; and it may be surrendered or forfeited, as Estates for Life before.

And inasmuch as this is but a Chattel, a Release of an Estate of Inheritance or for Life is not good to Lessee for Years without Privy ^f, as if Tenant in Fee or for Life release to Lessee for Years of his Disseizor. But a Release ^g of Termor for Years to Lessee for Years of him who ejected him is good; for Privy there is not requisite.

A Lease at Will is that which is during the Pleasure of ^h each of them, that is to say, as well of the Lessee as the Lessor.

As to a Tenant at Sufferance, that is, he who after the Determination of a Lease for the Life of another, or for Years made to him, holdeth over his Term, he hath not any lawful Interest, but is a Deforceor, ⁱ and a Writ of *Ad terminum qui præterit* lies against him, as we have said before.

CHAP. XII.

Of Chattels personal.

CHattels personal ^k are such as Gold, Silver, Plate, Jewels, Utenfils, Beasts, and other Cattle, and all moveable Goods whatsoever; also Emblements, and the like; for Emblements are Chattels which shall go to Executors,

PREROGATIVE.

If the King be Tenant in common of a personal Chattel which is entire, he shall have the whole; as upon an Obligation made to two, or two being possessed of a Horse, and the one attainted, the King shall have the whole Duty of the Obligation, and the entire Horse. H. 8. Ed. 4. 24. Danby. 19 H. 6. 47. Fitz. Debt. 38. Bro.

^d Plowd. 273. ^e Ibid. ^f 9 H. 6. 44. Co. Litt. 266. a. ^g 10 Co. 48. b. S. P. Co. Litt. 265. b. S. P. Bro. Part 2. 175. ^h 14 H. 8. 12. Bro. Leases, 13. Co. Litt. 55. a. ⁱ Ante, 41. b. F. N. B. 201 d. Plowd. 139. ^k Co. Litt. 118. b. Noy's Max. 50. L

Bro. Forfeit. 16. Jointen. 39. &
Prerog. 23. Plowd. 243, 323.

¹ Executors, and shall be forfeited ^m in Outlawry of Debt or

Trespas; but so it is not of Trees ⁿ, because they are Parcell of the Freehold.

[45] The Property of Beasts which are *feræ naturæ* (that is to say, Birds of the Air, Fishes of the Sea, Beasts upon Land, and in general all wild Creatures of Park or Warren, as Deer, Conies, Feasants, or Partridges, and the like) is not in any one. And therefore it is not ^b Felony to steal them, and a Writ of Trespas shall be *Wherefore he entred his Warren, and took away a thousand Hares, without saying his Hares.* And the Property hereof is not in any one even after he hath made them tame, ^c any longer than they remain in his Possession, as my tame ^d Hound which follows me and is with my Servant, my Hawk ^e which is flying to a Fowl, my Deer which is chased out of my Park or Forest, and the Forester makes fresh Suit; all these remain in my Possession, and the Property is in me: But if they estray, it is lawful for any Man to take them. Otherwise it is of Hens, Capons, Geese, Ducks, Peacocks, &c ^f.

Prerogative.

All Mines of Gold or Silver ^g, or in which the Gold or Silver is of the greater Value, belong to the King.

So of Goods whereof no Man claims any Property, as Treasure ^h trove hid within the Earth, not upon the Earth, nor in the ⁱ Sea, or Coin ^k trove, altho' it be not hid.

Royal ^l Fishes, as Whale and Sturgeons; or Birds ^m, as Swans and such like, whereof the Property is not known.

¹ 7 Ed. 3. 365. ^m 5 H. 7. 16. 5 Co. 116. b. ⁿ 4 Co. 63. b.

^a Dr. & Stud. lib. 1. cap. 5. 3 H. 6. 55. 12 H. 8. 3. 18 H. 8. 2. 7 Co. 17. b.

^b 12 H. 8. & 18 H. 8. ibid. 7 Co. 18. a. 1 Hawk. pl. Cor. 94. 3 Inst. 109, 110. Stamf. pl. Cor. 25. b.

^c 7 Co. 17. b. ^d 12 H. 8. 3. ^e 12 H. 8. 11. ^f 18 H. 8. 2. Hawk. pl. Cor. 94. ^g Plowd. 336.

2 Inst. 577, 578. ^h Fleta, lib. 1. cap. 43. St. Pl. Cor. 40. 3 Inst. 132. ⁱ 5 Co. 108. 2 Inst. 168.

^k 27. Aff. pl. 19. ^l Fleta, lib. 1. cap. 45. and 46. Plowd. 315. 5 Co. 108. b. 7 Co. 16. a. Stamf. Prerog. 37. b. 38. a. ^m 7 Co. 16. a.

2 Inst. 167, 168.

Goods

Goods ^a wrecked, and ^o Beasts, &c. estrayed; for Wreck ^p is an Estray upon the Sea coming to Land, as an Estray of Beasts is upon the Land coming into some privileged Place. ^q But in both Wreck and Estray, the Owner hath a Year and a Day to claim them. And the Estray ought to be proclaimed ^r in the Market in two several Towns adjoining. And therefore until that done, and the Year and Day passed, the Lord of the Franchise hath not any Property. For if ^s he keep an Estray three Parts of a Year, and yet within the Year it stray again, and another Lord receives it, the first Lord may not retake it, because until the Year and Day passed, and Proclamations made, he hath not any Property in it; and therefore the Possession of the second Lord is good against him.

Statutes.

Vide Westminster 1. cap. 4. *Where a Man, Dog, or Cat, escape alive out of a Ship, it shall not be adjudged Wreck: but the Things shall be saved by the Sheriff or Coroner, and delivered into the Hands of the Town where they are found, to answer for them before the Justices: So that if any one can prove within the Year and Day that the Goods are his own, they shall be restored to him.*

Prerogativa Regis, cap. 11. *The King shall have Wreck throughout all the Realm, and Whales and Sturgeons taken in the Sea, or within the Realm.*

If an alien Enemy takes any Goods in Battle, this divests the Property out of the Owner, if he doth not come before the Setting of the Sun to claim them ^[b].

C H A P. XIII.

Of Contracts, Testaments, and Legacies.

Hitherto of *Chattels*. Now will we speak of *Acts* and *Torts* which concern them. And first such as concern all manner of Chattels, real and personal.

^a 5 Co. 106, &c. ^o 14 H. 6. 5. 5 Co. 108. ^p Ibid.
^q 31 Ed. 3. Fitz. Estray, 4. ^r Bro. Estray, 10. ^s 33 H. 8.
 Bro. Estray, 11. ^t Vide Fleta, lib. 1. cap. 44. Dr. & Stud.
 lib. 2. cap. 51. ^u 7 Ed. 4. 14. Vavasor. Ante, 10. b.

THE SECOND BOOK

These *Acts* are first Contracts, then Testaments and Legacies, which take effect after Death.

A *Contract* is, when a Man is to have Money, or the like, for some other Thing, as upon a Sale, a Lease for Years, or the like.

The Duty ^a arising upon a Personal Contract is not apportionable; as if I sell my Horse, and the Horse of J. S. for 10*l.* and J. S. takes his Horse from the Vendee, yet the Vendee shall pay to me the whole Sum.

Sale ^b of the Goods of another Man in Market-overt (without Covin ^c or Knowledge to whom the Goods belong) alters the Property, if the Toll ^d be paid.

To this Place belong certain Contracts that are *quasi* Contracts in Law, altho' that they do not arise upon any especial Agreement of the Parties. As he ^e who finds the Goods of another, is chargeable by reason of the Possession, to him that hath Right to them; he ^f who receives Money to the Use of another, or to deliver over, is chargeable as Receiver; he ^g who enters into Land of his own Head, and receives the Profits, or Parents, who occupy Land purchased by an Infant, are chargeable as Bailiffs; and ^h if a *Liberate* be delivered to the Clerk of the Hanaper who hath Affets in his Hands, Action of Debt shall lie against him.

A *Testament* (which is also called a Last Will) is the * Appointment of some Person (whom we call an Executor) to administer his Chattels for him after his Death; for if he doth not name Executors, or if † they all refuse, it is not any Testament; but a Will of Land, *viz.* where it is devisable by Custom or by the Statute, is good, ⁱ altho' no Executor be named; for Land is not testamentary by the Course of the Common Law; and ^k that which completes the Executor-

* 30. H. 8. Bro. Apporcionment, 7. ^b Dr. & Stud. lib. 1. c. 25. 33 H. 6. 5. 7 H. 7. 12. ^c Dr. & Stud. lb. & lib. 2. c. 47. 18 Ed. 4. 24. 14 H. 8. 8. Plowd. 46. 33 H. 6. 5. a. b. 3 Co. 78. b. 2 Inst. 713. ^d 35 H. 6. 29. b. ^e 27 H. 8. 13. Dr. & Stud. l. 2. cap. 38. ^f F. N. B. 116. Q. 117. A. B. ^g Ibid. 2 H. 7. 8. ^h Plowd. 36. ⁱ Godolph. orph. Legacy 12. † Post. 46. b. 14 a. B. c. Use of the Law, fo. ult. ^j 37 H. 8. Bro. Testament, 29. Godolph. Orph. Legacy, fo. 4. 12. ^k 3 H. 6. 7. ship,

ship, is the Administration; for if a Man makes three his Executors, but willeth that only one administer, he is sole Executor.

And to them shall go all the Chattels of the Testator ^[46] real and personal, as well in Possession, as Debts due to him, &c. but not in Case where † he is only to recover Damages; as where his Goods are carried away, or that one is to render to him an Account; for ^b the Executor at the Common Law should not have Action of Account or Trespass for Goods carried away in the Lifetime of the Testator.

Also this Administration is for the Testator and to his Use; so that the Executors ^c themselves may not devise the Goods, nor thereof make ^d Partition between them, &c. nor shall the ^e Husband of a Feme Executrix have them by Intermarriage; nor shall they be forfeited ^f by Outlawry of the Executor. And seeing that Executors administer for the Testator, they do represent his Person; so that a ^g Villain, if he be Executor, shall have Action of Debt against his Lord for a Debt due to the Testator; and ^b Outlawry, ⁱ Excommunication, &c. is not any Disability to bring Actions as Executor. And all the Executors are but as one Person; for which Reason the ^k Release or ^l Attornment of one is good for both. In Action of Debt, Covenant, or the like, against them, one shall not answer without the other by the Course of the ^m Common Law; and they ⁿ may not, each for himself, have served Pleas in Abatement of the Writ, &c.

Yet their Power, both as to the Time when, and also as to the Things which, they shall administer, may

^a 20 Ed. 4. 9. † Vid. Godolph. Orphan's Leg. 155.
^b Plowd. 290. 19 Ed. 3. Fitz. Account, 56. 7 Ed. 3. 62. 2 Inst. 404.
^c Plowd. 525. ^d 27 H. 8. 22. ^e 2 H. 7. 29.
^f 10 Ed. 4. 1. b. 1 Rol. Rep. 147. Godolph. Leg. 156. 2 Rol. Rep. 325. 21 H. 6. 30. ^g 21 Ed. 4. 50. Ante, 8. a. Littlet. §. 101. Doc. Pla. 388. ^h 21 H. 6. 30. b. 21 Ed. 4. 49. b. 14 H. 6. 15. Co. Litt. 128. a. Ante, 8. a. Doc. Pla. 9. acc. ⁱ 42. Ed. 3. 13. b. Contra. 21. Ed. 4. 49 b. Contr. 21 H. 6. 30. Contr. 14. H. 6. 14. Contr. Doc. Pla. 8, 10, 173. Contra. Co. Litt. 134. Cont. Godolph. Orph. Legacy 38. 155. ^k 48 Ed. 3. 14. ^l 32 Ed. 3. Fitz. Quid juris, clam. 5. ^m Viz. until 9 Ed. 3. cap. 3. ⁿ 37 H. 6. 17.

well enough be divided; ° as where a Man makes A and B his Executors, and that A shall not intermeddle during the Life of B, or makes one his Executor for his Goods in D, and another his Executor for his Goods in S.

For these Purposes, such Person is named Executor :

^p And is chargeable for all Duties of the Testator (but not for Trespass done by him, burning of Writings delivered to him by Deed indented, ^q Receipt of Rents, or Occupation of Land as Bailiff, for here there is not any Duty in certain) as well before as when he hath Affets in his Hands of the Chattels of the Testator wherewith to answer them; ^r and therefore they shall be charged of their own Goods if they waste the Goods of the Testator; but Duties ^s by Matter of Record shall be satisfied before other Duties, ^t afterwards Duties by Specialty, and Legacies shall be last paid.

Statutes.

Westminster 2. cap. 23. *Executors shall have a Writ of Account, and the same Process therein, as the Testator himself should have had.*

4 Ed. 3. cap. 7. *Executors shall have Trespass for Goods carried away in the Life-time of the Testator.*

[b] 9 Ed. 3. cap. 3. Stat. 1. *In Debt against them, all of them shall have but one Essoign before Appearance, and another after Appearance. He that appears at the Grand Distress shall answer to the Plaintiff. And the Plaintiff shall have Judgment and Execution against all named in the Writ, as if all of them had pleaded.*

An Executor of an Executor, is an Executor to the first Testator, and shall have Action of Debt for Arrearages due to him ^a.

Statutes.

25 Ed. 3. cap. 5. ^b Stat. de Prodic. *They shall have Actions of Debt, Account, Trespass of Goods of the*

° 32 H. 8. Bro. Executors, 155.

N B. 117. c.

11.

2. Fitz, Executor, 110.

Law, 2 Inst. 404.

^r 2. H. 6. 12.

^p 11 H. 4. 46.

^q F. Dr. & Stud. lib. 2. cap.

^t 21 Ed. 4. 21. b.

^a 10 Ed.

^b This is in Affirmance of the Common

first Testator carried away, and Execution of Statutes and Recognizances made to him.

A *Legacy* is when a Man devises, that is, gives to one a Chattle by his Will, or otherwise, to have after his Death; for if ^c he doth not name an Executor, or if all the Executors refuse, so that in both Cases there is not any Will, yet the Legacies shall be paid, and the Testament annexed to Letters of Administration.

And this ^d the Devisee may not have (either to enter upon a Term, or to take a Chattle personal) without the Delivery of the Executor. But upon a Lease for 20 Years devised to one for the first ten Years, and the Remainder of the Term to another ^e, or a Devise to one for so many Years as he shall live, the Remainder to another, there the Delivery to the first Devisee enures to him in the Remainder also. So ^f where but the Occupation of a Term is devised, for the Occupation and Profits of the Land are all one with the Land itself. But If the ^g Occupation of a Book, a Glas, or such Chattel personal, be devised to one for Life, and after his Death to another in like manner, there the Delivery to the first doth not enure to the other; for their Occupations are several, and in a Chattel personal the Occupation is distinct from the Property.

In these Devises ^h the Intent of the Testator (which stands with the Rules of Law) shall be taken; as where a Man devises Lands (devisable by Custom) to his Son and Heir after the Death of his Wife, ⁱ the Wife hath an Estate for her Life by Implication of the

^c 37 H. 8. Bro. Testament, 20. ^d 2 Ed. 4. 13. 30. b. 20 Ed. 4. 9. 21 Ed. 4. 21. 11 H. 4. 84. Bro. Devise, 11. 2 H. 6. 16. 27 H. 6. 8. 4 H. 7. 16. Co. Litt. 111. a. ^e 37 H. 6. 30. Per Prisot & Nedham, & concordat. temp. H. 8. & Ed. 6. deste bon ley, as the Book saith. Plowd. 521. S. C. Accord. and 10 Co. 47. b. S. P. said to be granted Per omnes in Argum. And vid. Accord. 1 Rol. Abr. 630. 3 Bulst. 123. Bridgman, 55. Godolph. Leg. 145, 360. ^f Plowd. 541, 543. Bro. 79, 80. ^g 37 H. 6. 30. Bro. Devise 13. & Plowd. 542. ^h Plowd. 540. Hob. 32. ⁱ 13. H. 7. 13. b. & 17 Bro. Devise 52. 29 H. 8. Bro. Devise 48. Plowd. 158, 414, 521. Hob. 32. Moor, 852, 853. Cro. Ja. 75. 1 Rol. Abr. 843. Vaugh. 264. Vide a like Case Ante, 18. a. pl. 111.

Intent of the Devisor; a Devise^k to one and his Heirs male is an Estate Tail; but^l a Devise to J. S. in Fee, upon condition that if he do not pay to J. D. a certain Sum of Money, that J. D. shall have it in Fee, this is a void Condition, and Remainder, for it is contrary to Law; but^m a Devise of a Fee Simple to Alice S. and after her Death to B. is only an Estate for Life to Alice S. Remainder for Life to B. Remainder to Alice S. in Fee; so that the Husband of Alice (if she die in the Life of B) shall not be Tenant by the Curtesy.

Statutes.

[47] Merton, cap. 2. *Widows may devise their Corn, as well of the Land in Dower, as of other Land.*

32 H. 8. cap. 1. *He that hath Land in Soccage, and none holden by* Chivalry, or Soccage in Chief, may devise by Writing, or dispose of by Act executed in his Life Time, the whole thereof.*

He that hath Land holden in Soccage in Chief, and others in Soccage, but none holden of any in Chivalry, may so devise, or dispose of all his Lands, saving to the King Primer Seizin, Relief, Livery, Fine for Alienation, and all the Advantages for Soccage in Chief.

He that hath Land of Inheritance holden of the King by Chivalry in Chief, may devise or dispose of, for the Advancement of his Wife, Preferment of his Children, and Payment of his Debts, or otherwise, two Parts thereof in certain, saving to the King the Wardship, or Primer Seizin of the third Part, without Diminution, Dower, or other Charge, and also saving Fines for Alienation.

He that hath such Lands, and other Lands holden of the King, or of other howsoever, may so devise or dispose of, two Parts of the whole; saving as next before.

He that hath Land holden of a common Person in Chivalry, and other Lands in Soccage, may so devise or

^k 27 H. 8. 27. by Fitz. and Shelly clearly. Hob. 32. Co. Litt. 27. a.

^l Dyer 33. pl. 12. 1 Co. 85. b. 2 Rol. Rep. 216. Cro. Ja. 592. 19 H. 8. 8. Cro. Car. 58. Winch. 56. 2 And. 11, 141. Palm. 49. 2 Leon. 114. Vaugh. 270.

Ante. 29. *b.

^m Dyer, 357. pl. 44.

* Note, that the Tenure by Chivalry, being now abolished by Stat. 12 Car. 2. c. 24. therefore all that which relates herein to the Disposal of such Lands, is utterly abolished.

dispose

dispose of, two Parts of the Lands in Chivalry, and all the Soccage Lands; saving to the Lord the Wardship of the third Part, without Diminution, or Charge, as above.

He that holdeth only of the King in Chivalry, and not in Chief, or of the King in Chivalry not in Chief, and of another in Chivalry, and also other Lands in Soccage, may so devise two Parts of both the Lands in Chivalry, and of all the Soccage Land; saving to the King, and also to the Lord the Wardship of the third Part of that holden of him, without Diminution, &c.

If more than two Parts, or the Value of them be devised, or disposed of, the King may seize so much as along with that he hath, will make a full third Part. The same Benefit is given to the Lord for his third Part, as to the Title of Wardship.

Livery, Relief, and Heriot, remain as before; and a Fine for Alienation shall be paid upon a Writ of Entry, in the Post for common Recovery of Land in Chief.

If there are two Jointenants, and to the Heirs of one, [b] of Land holden of the King in Chivalry, and he who hath the Fee die, his Heir within Age, the King shall have the Wardship of the Body, and after the Death of the other, he shall have the Wardship of the Land.

34 & 35 H. 8. cap. 5. For the Explanation of the above Statute.

Where the above Statute saith, a Man seized of an Inheritance shall devise, this is intendible of an Estate in Fee Simple, and also of a sole Estate, or in Coparcenary, or in Common.

The Devise shall not be to a Body Politic.

It shall be good for two Parts, although the whole be devised.

The Devise may be of two Parts of a Rent-Service incident to a Reversion holden of the King in Chief, or of any Rent, Common, or other Profit out of the two Parts.

If the Certainty of two Parts doth not appear by the Will, or otherwise by Writing, then this shall appear by Commission out of the Court of Wards, (that is, if the Tenure be by Chivalry in chief) by the Oath of twelve Men, if the Master of the Wards, and the Parties cannot otherwise

wife agree upon the Division. So of Land, Rent, or other Profit, (that is, if it be holden of a common Person in Chivalry) and the Certainty shall appear by Commission out of Chancery, if the Lord and the Parties cannot otherwise agree upon the Division.

The King, or common Person, shall have for their third Part, the Lands which descend in Tail immediately after his Death, and the Devise, or Disposition of the two Parts remaining, shall be good, altho' it be of all the Fee Simple Lands.

If any Part of the third Part be evicted, the King, or other Lord, shall have so much as with that which remains, and the other two Parts, will make a third Part.

The Devisee shall have a Pardon of course out of Chancery for Alienation without License, paying for his Fine the third Part of the yearly Value of the Land.

A Devise by a Feme-Covert, Infant, Ideot, or Person of unsound Memory, shall not be good.

[48] Upon an Estate made by Covin to defraud any of his Wardship, or the like, the King after Office shall have all that belongs to him, as if no such Estate had been made, and a common Person shall have a Writ of Right of Ward for the Wardship of the Body and Land, and may distrain for Relief, Heriot, or other Profits.

He of whom the King, or other Lord, takes any Land to make a full third Part, shall have Contribution against all others that Claim under the Devise, or Disposition, by Bill exhibited in the Chancery.

The Wife^a, and such of the Children as have not been advanced by him in his Life-Time (as if a Daughter^b be suitably married by him, this is a sufficient Advancement) shall have each of them a Part of his Chattles, that is to say, his Wife a third Part, and

^a The Stat. Mag. Cha. 28. is that the Debt of the King shall be levied of the Goods of the Deceased, and the Surplus delivered to the Executors, saving to the Children, and to the Wife, their reasonable Parts; which proves, that this Rationabili Parte, was at the Common Law, F. N. B. 122. l. Bro. Rationabili Parte, 6. But Lord Coke on Litt. 170. b. 2 Inst. 33. seems contrary. ^b 3 Ed. 3. Itin. North. Fitz. Dette. 156.

the Children another third Part; this is to be intended after his Debts are paid; and whether there be a Will made or not.

CHAP. XIV.

Of TRESPASSES.

THE *Torts* hereupon, that is, which may be made on Lands or Goods, are all manner of Trespases, whereof we have spoken before, with Force or against the Peace; for although, at the Suit of the King, they are Offences against his Crown and Dignity, yet as to the Party, they are but personal Torts.

If the Trespass in Land be done by Beasts or other Chattles, ^c Shocks of Corn, or other Thing whatsoever, be they such whereof a Man may have Conusance to have Replevin, or not, may be distrained Damage-Feasant, by him that is endamaged thereby; as a ^e Commoner, or the like, altho' he hath not any Thing in the Land itself, so that he may not have ^f Action of Trespass against the Beasts for their Entry into the Land, nor for treading down the Grass. But *Cestuy que Use* ^g, may not distrain for Damage-Feasant, for he hath not any Thing to do in the Land, but only what is a bare Confidence between the Feoffee and him; but the Feoffees may punish [b] him by the Common Law, if he occupies the Land, for he is ^h but a Stranger. And if a Stranger of his own Head takes Beasts Damage-Feasant, the Owner

^c Co. Litt. 47. a. 21 H. 7. 39. b. Bro. Distress, 30. 11 H. 7. 14. Ibid. 102. ^e 24 Ed. 3. 42. a. 46 Ed. 3. 23. b. 15 H. 7. 2. a. b. and 12. b. Kelwey, 41. b. 42. b. 47. a. 9 Co. 112. b. 2 Brownl. 148. Yelv. 104. 1 Rol. Abr. 320, 405. 10 Ed. 4. 4. 13 H. 7. 15. b. 14 H. 7. 3. b. F. N. B. 128. c. Godbolt, 185. Style, 428. 2 Str. 777. ^f Kelwey, 47. a. adjud. 1 Rol. Abr. 320. pl. 13. 2 Brownl. 148. 9 Co. 112. b. 22 Aff. pl. 48. Bro. Common, 24. 15 H. 7. 13. Ibid. 39. Vide Jenk. Cent. 144. it is said contra. Terms de Ley ad. V. Common contra. ^g Kelwey, 41. b. ^h Kelwey, 42. b. Frowick.

of the Beasts may punish him, for he is damaged by the chasing of them, and the other hath received no Prejudice at all.

C H A P. XV.

Of Torts peculiar to Chattels Real.

THE *Torts* peculiar to Chattels Real, are in Matters of *Wardship*, or *Land*.

In Matter of *Wardship* is, in Case of the Wardship of the Heir, that is, of the Body, or the Land, or both, the Deforcement thereof.

In Case of Wardship of the Land only, is Ejectment of Ward, and Intrusion of Ward; for a Writ of *Ejectione Custodie*, lies not of the Land and Heir, but of the Land only.

Ejectment of Ward, is when a Stranger ^k ejects the Guardian, whether in Chivalry or ^l Soccage.

Intrusion of Ward, when the ^m Heir enters upon the Guardian in Chivalry, and ousts him, whether during his Non-age, or after his full Age.

In Matter of Land, is Ejectment, or Deforcement of his Farm.

Ejectment, when any one ⁿ, whether the Lessor, or a Stranger, ousts him.

Deforcement ^o, when the Feoffee in Fee, or for

^l Post. 107. a. Terms de Ley V. Gard. Dyer, 369. pl. 36. And Note 14 Ed. 3. Fitz. Brief, 316 acc. Sed. Fitz. Gard. 4. et F. N. B. 139. l. Cont. If the Ejectment of Ward be brought of Land only, the Party ought to shew the Certainty of the Land; if of the Body and Land, the Writ should be general, de terris et hæred. and then it is said by others, to be good. 11 H.

4. 64, 65.

^k F. N. B. 140. c.

^l 26 Ed. 3. 65.

13 H. 4. 17. 16 Ed. 3. Fitz. Waste. 100. Contra. ^m F. N. B. 141. c. 21 Ed. 4. 10. b.

ⁿ F. N. B. 220. f. Post. 107.

b. 21 Ed. 4. 10. Note, if he be not in actual Possession at the Time of the Ejectment, this Writ does not lie, Kelw. 130. a.

1 Rol. Rep. 3. 22 Ed. 4. contrary of Renr, ut dicitur Bro. Eject. Cust. 9. It lies against the Ejector, though he has aliened.

12 H. 4. 10. ^o F. N. B. 197. S Quare Ejec. inf. Term.

21 Ed. 4. 10. 30. Post. 100. a. 1 H. 5. 4. Vid. If the Term expire pendent the Writ, it shall not abate. 11 H. 6. 6.

Life of the Lessor, holdeth him out; for where the Lessor enters and infeoffs another, the Feoffee or Lessee for Life, is not the Person who ousts him, but he is a Deforfeor only.

Prerogative.

A Woman who holdeth *in Capite*, as also the Widow of such a Tenant being endowed, ought not to marry herself^p without License of the King; and if she do, the King shall seize the Land holden until she make a Fine.

Statutes.

Prerogativa Regis, cap. 4. *Accord.*

Vide 32 H. 8. cap. 46. *That they are not within the Survey of the Court of Wards.*

C H A P. XVI.

[49]

Of Personal Charges and Torts.

AS to Chattels Personal,

The *Acts* peculiar to them are, that they may be pledged, or received to the Use of another.

Pledge, is when one delivers a Chattel Personal to a Man in Assurance of another Thing had of him at the same Time^a; as if he takes a Chain of Gold for Money then delivered, &c. but not if it be to satisfy a Debt which he owed. The^b Property of the Pledge remains in him who pledges it, for he shall be answerable if it be casually lost or broken, and he to whom it is pledged, shall not be attached^c for it, because he is not the Owner.

Receipt to the Use of another, is by Bailment, or otherwise.

Bailment, is a Delivery for another, whether it be for the Bailor to re-deliver to him again^d, in which Case, the Bailor may re-take them without Request, or for a Stranger to deliver over to him^e, in which Case,

^p F. N. B. 263. c.

^a 5 H. 7. 1.

^b Dr. & Stud.

lib. 2. c. 38.

^c 35 H. 6. 25. per Moile.

Bro. Attachm. 20.

^d 5 H. 7. 18.

^e 1 Ed. 5. 2.

before

before such Delivery over, the Bailor may countermand the Bailment, and command the Bailee to deliver it to him again, and shall have Account against him upon Refusal; for in none of these Cases, is the Property out of the Bailor.

Receipts in other Manner, is 'either as Bailiff of his Manors, Lands, or his Goods, or as Receiver of his Money, Debts, Rents, or the like. ^s And of Things certain, as Profits of Court, Fee-Farms, Issues, Fines, Amercements, the Writ shall be against him as Receiver; otherwise it is where there may be Approvement, as Bailiff of a Hundred, or the like.

And in both Cases, the Party ought to render Account.

The personal Charges, are Obligation and Covenant, both by Deed, and Assumpsit, which is by Parol.

Obligation, is when a Man binds himself by his Deed in any Sum, and it hath for the most part a Condition endorsed upon it, for the Payment of a lesser Sum, or the Performance of another Thing; sometimes it is single without any such Condition.

Statutes.

- [b] 38 Ed. 3. cap. 4. ^b *Whereas divers Men be bound in another Court out of the Realm by Instruments, or in other Manner; it is accorded, that all Penal Bonds in the third Person, be void.*

Merton, cap. 5. ⁱ *Usury shall not run upon the Heir within Age.*

Covenant, is when a Man covenants by Deed to do any Thing, or where he hath done it as to make a Feoffment, to build a House, to give a Horse, to make an Assurance, &c. But if I covenant and grant with you, that my white Horse from this Time forwards shall be your Horse, here you shall not have Action of Covenant against me, although I retain the Horse, for I did not covenant to do any Thing for the Time to come, nor that any Thing was done in Time passed^k.

^f 43 Ed. 3. 21. b. F. N. B. 116. p.

^g 9 Ed. 4. 40. b.

^h 40 Ed. 3. 1. 2 H. 4. 10. 8 Ed. 4. 5.

Co. Litt. 229. b.

230. a.

ⁱ Co. Litt. 246. b. Repeated 37 H. 8. cap. 9.

^k Plowd. 308.

Assumpsit,

Assumpsit, is when a Man so promises by Parol¹, and it is not of any Force, except it be upon a good Consideration, as for Money given, to incoff him. But if I assume to ^mgive to you £10 for building your Hall; or if a Carpenterⁿ, without any Consideration of Money or other Thing, assumes to build a House, or the like, this Assumption is not binding; for it is but a rude Contract^o, whereupon no Action doth ever arise. And the Reason is^p, because the Agreement is by Parol, which pass from Men lightly, and unadvisedly; but in a Covenant, where the Agreement is made by Deed, there it hath more stay; for he first causes it to be written, and afterwards puts his Seal to it, and then delivers it; and for this reason, it shall bind him without having any regard to the Cause, or Consideration of the doing therot.

Inhabitants in Towns, or other like particular Societies, may make By-Laws, that is to say, proper Ordinances to bind themselves (as to Personal Things, as Payments, and the like) in other manner than the Law prescribes^a.

This is to be intended^r where such Ordinances are for the public Good, as for Reparation of a Church, or of a Highway, or the like. And in such Case the greater Part shall bind the whole without any Custom. But if it be for their own private Profit, as for the well ordering of their Common of Pasture, or the like, there without a Custom none shall be bound but those that assent to it.

The Torts are in Detainment of Goods, not rendering an Account, not performing a Contract, Covenant, Assumpsit, or the like.

¹ Plowd. 308. ^m Ibid. 17 Ed. 4. 5. Dr. & Stud. lib. 2. cap. 24. ⁿ 11 H. 4. 33. Bro. Action sur Case. 40. Plowd. 309. ^o Ibid. 308. Dr. & Stud. supra. ^p Plowd. 308. ^a 44 Ed. 3. 19. 5 Co. 63. Hob. 212. ^r 44 Ed. 3. 19. 8 Ed. 2 Affize. Fitz. 413. 21 Ed. 4. 54. 11 H. 7. 13. 21 H. 7. 20 & 40. 5 Co. 63.

CHAP. I.
Of SUITS.

THUS have we gone through both the Parts of the Law. The Remedy yet remains when a Thing is done otherwise than the Law directs, which Remedy is generally by way of Suit, which is dispersed throughout the whole Law, as the Blood is thro' the Body. In some special Cases it may be by Arbitrement, or Accord.

A Suit is when it is before the Judges, who, in respect of the Place wherein they are to do Justice, are commonly called the Court. He that sues is called the *Plaintiff* in a Personal Action, *Demandant* in a Real Action; and he that is sued, is in the first Case called the *Defendant*, and in the latter the *Tenant*.

The Parties are here, for their Aid, allowed Counsel learned in the Law.

Statutes.

Vide 11 H. 7. cap. 12. *Poor Men shall have Writs out of the Chancery, and Counsel and Attornies, and the like, assigned for them there, and in all other Courts of Record, without paying any Thing.*

Of all apparent Faults, (as of 'false Latin, or Default of Form' in the Writ, Insufficiency in an Office, or Indictment, Misawarding of Process, (as of an Exigent, where no Exigent lies) Impossibility in the Plea (as in a Writ of Account, supposing him to be his Receiver for seven Years, and the Defendant pleads

[b]

* Vide Ante 22. b. * Co. Litt. 127. b. * 1 H. 6. 16. b. Post. 53. b. 9 H. 7. 16. b. Bro. Faux. Latin. 78. Amendment, 62. Obligation, 71. 2 H. 4. 8. a. 44 Ed. 3. 18. 10. Ed. 3. 1 & 553. 2 Sand. 39. 5 Co. 121. a. 8 Co. 159. b. 9 Co. 48. a. 10 Co. 133. a. 2 Vent. 173. 1 Lev. 2. * 14 H. 4. 10, 11. 27 H. 6. 6. b. 11 H. 6. 14. 34 H. 6. 26. 28 H. 6. 11. 8 Co. 159. b. * 5 Ed. 4. 7. * 7 H. 6. 5.

fully

fully accounted such a Day, which is the first Day of the seven Years) of all these, the Court shall take Notice to abate the Writ, to award a Superfedeas upon such Offices, Indictments, or Process, to stay the Judgment, if the Plea of the Defendant be found against him, &c. although the Party do not take Exception to it; and therefore, although he that casts the Essoign, may not plead in Abatement of the Writ by way of Plea*, yet if there be any Matter apparent to the Court, as ^a Henry, &c. Duke of Ireland, (where it should be Lord, &c.) he, and every other Stranger, as *amicus curiæ*, may, and the Court is *ex Officio* bound to abate it, although the Tenant, or Defendant make Default.

To every Court belong Officers and Clerks.

Officers, to execute that which the Court commands; Clerks, to enter the Things done in Court.

Or, according to the Division of the Realm of England into several Counties, it behoves first to speak of the Courts at Westminster, which are general for all the Realm, and then of all the Courts in every County.

The Courts at Westminster, which are the Chancery, King's Bench, Common Bench, and Exchequer, (each of them for Things within their respective Jurisdictions) are the King's Courts, and they, viz. the Judges thereof, are Judges of Record^b.

Prerogative,

The King appoints them.

So that all Things there recorded are of so great Credit^c,
that

PREROGATIVE.

The King may sue in any of these Courts that he will; that is, he may have a Quare Impedit (F. N. B. 32. e) or a Writ of Escheat (Ibid. 144. g.) returnable in the King's Bench, or a Quare Incumbavit there, although the Record of the Recovery be in the Common Pleas. Ibid. 48. c.

PREROGATIVE.

The King doth not receive, nor part with any Hereditaments (Dr. & Stud. l. 1. cap. 8. Ante. 20. b. Plowd. 213, 484. 5 Ed. 4. 7. Noy's Max. 17.) though it be but for Years, (otherwise of an Obligation, 21 H.

* Termes de Ley, 1. S. P. Hob. 280.

^a 4 H. 6. 16.

b. Bro. Brief, 212. Office of Court, 6. 9 Co. 48. a. ^b 9 Ed. 4:

42. b. ^c 21 H. 6. 34. 1 Leon. 183. 9 H. 6. 60. 1 Rol.

Abr. 862. pl. 1. Bro. Error, 78. Plowd. 491. Co. Litt. 117.

b. 260. 4 Co. 71. a. 6 Co. 15. b.

H. 7. 19. or a Chattel Personal, 39 H. 6. 16. b.) but by Matters of Record. For to personal and transitory Things, as the Goods of Felons and Fugitives, Wreck of the Sea, Treasure Trove, and Profits of Land, of Persons outlawed in a Personal Action, &c. The King is entitled without Office, or other Matter of Record. Stamf. Prær. 59. But to take a Freehold for a Condition broken. Plowd. 213. 5 Co. 52. b. or a Purchase of his Villain. 35 Ed. 3. Bro. Prær. 113. Plowd. 229. or the like, he may not without Office, or other Matter of Record; otherwise it is where the Law casts it upon him, Plowd. 229. as in a Gift in Tail Remainder to the King. And for this Reason also, the King takes a Freehold without Livery or Seizin by Deed inrolled, 5 Ed. 4. 7. but he may not be infeoffed by Deed without Enrollment of Record, because no Livery may be made to him. Vide Trin. 8. Ja. 1. Staccar. Sir Edw. Dimock's Case. 2 Rol. Abr. 204. pl. 3. 205. B. pl. 2.

Of Land, or the like Thing permanent, whereof he is in Possession by Matter of Record, or other good Title, none may put him out, Stamf. Prær. 74. but if having no Title by Matter of Record, or otherwise, he enters upon me, and ousts me; there if I enter again, my Entry is lawful, and no Intrusion. 3 H. 4. 16. per Stamf. Prær. 57. So if the King be seized upon an Office, which finds that his Tenant died seized but of an Estate for Life, the Reversion to another, he in the Reversion may enter and make a Feoffment, for the King is seized by Colour of Record, which Record gives to him no Title in Deed.

Also of a Thing transitory and removable, the King may be put out

that no Averment may be taken against them. For which Reason, Parties are estopped by them^d, as upon a Lease made by Fine, both Parties are estopped to say, that the Lessor had nothing in the Land^e; same Law of Pleas in Barr, Replications, &c.

^f Villenage, except that he and his Ancestors were Villains for Time whereof, &c. commences by his own Confession, that he is a Villain in a Court of Record.

^g And if in a *Præcipe quod reddat*, the Tenant says that he is a Villain to J. S. and holds the Land in Villenage, and the Demandant says he is Free, &c. there, altho' the Jury find him Free, yet he continues a Villain to J. S.

A Recognizance, that is to say, when a Man acknowledges a Debt in a Court of Record, or the like, be it to the King, or to a common Person, is the highest Bond that^h may be, and as a Judgment, whereupon a *Scire Facias*, as well as an Action of Debt lies. And therefore, if it is acknowledged by an Infant, it shall not be avoidedⁱ by him, but during his Non-age by *Audita Querela*, as

^d Plowd. 434. Ante. 24*. a. §. 175. Fleta, l. 1. c. 3. pl. 3. Villenage. 6 Co. Litt. 122. b. 232. pl. 9.

^e 21 H. 7. 24. b. ^f Litt. ^g 41 Ed. 3. Fitz. Villenage. ^h 36 H. 6. 6. ⁱ Dyer,

a Fine shall be by Writ of Error; for it shall be tried by Inspection of the Court, whether he was within Age or not.

The Form of a Recognizance in the Common Pleas, or the like, is, ' *Be it remember'd that*

R. F. of &c. the second Day of in this same Term *came here into Court in his proper Person, and acknowledged himself to owe to T. B. 200 l. &c. to be paid, &c. and if it be not so done, he grants that the Sum aforesaid be levied of his Goods and Chattles, to the Use of the said T. to whosesoever Hands, &c.*

Statutes.

Westminster 2. cap. 11. *Elegit given upon a Recognizance.*

11 Ed. 1. Stat. Acton Burnell. *A Debt acknowledged to a Merchant before a Mayor and a Clerk appointed for the same, shall be enrolled; and also the Clerk shall make an Obligation, to which the Seal of the Debtor, with the Seal of the King, shall be put. Upon Money not paid at the Day, the Mayor shall presently cause his Moveables to be taken, and if he cannot find a Buyer, he shall deliver them to the Creditor. And if the Debtor have not Goods within the Jurisdiction, then it shall be done by Writ out of Chancery, upon the Recognizance certified there. The Praisers of the Goods shall take them, and answer to the Creditor for them, if they praise them at too high a Price. But if he hath not Moveables, whereof, &c. then his Body shall be imprisoned until he agree, &c. The same Process against Pledges, if the Principal have not sufficient.*

13 Ed. 1. Stat. De Mercatoribus: *His Body shall be first taken, if he be a Layman. If he is not within the Jurisdiction, it shall be done by Writ out of Chancery, upon Certificate of the Recognizance there. And if he doth not agree with the Creditor, within a Quarter of a Year, then all his Lands, Tenements, and Goods, shall be delivered to the Creditor upon a reasonable Extent; and the Conusee shall have Assize, if he be ousted.* [b]

out of Possession, and may have his Action accordingly. 1 H. 7. 19. as a Ravishment of Ward, Quare Impedit, &c. But of Things permanent, he may not have Action as a Præcipe quod reddat, Ejectment of Ward, because of such Things, he may not be put out of Possession.

The Writ out of the Chancery shall be returnable before the Justices of the one Bench or the other. Upon Non Est Inventus returned, or that he is Clericus, Writs shall issue to the Sheriffs of all the Counties where he has Lands, or Goods, to deliver the same upon a reasonable Extent, and to what Sheriff he will to take the Body.

Lands which he had the Day of the Recognizance shall be liable into whosoever Hands they come.

The same Process against the Pledges.

If the Debtor or the Pledges die, the Creditor shall have Execution upon the Land of the Heir at his full Age.

5 H. 4. cap. 12. When a Statute Merchant is once shewn in the Common Pleas, upon the same certified in Chancery, and a Writ awarded returnable there, altho' the Process is discontinued, yet upon Process re-continued, Execution may be awarded, without shewing it again.

Vide 27 Ed. 3. cap. 9. Every Mayor of the Staple shall take Recognizances of Debt before him, and the Constable of the Staple. Upon Default of Payment, his Body shall be taken, and Goods to the Value sold, if they be found within the Staple, until he agree, &c. Otherwise, upon Certificate into Chancery, a Writ shall be commanded to take his Body, and to seize his Lands, Tenements, and Goods, returnable in Chancery. And Execution shall be as in a Statute Merchant, and Assize, if he be custed. But the Debtor shall not have Advantage of the Quarter of a Year, which is contained in the Statute Merchant.

[52] *Vide 11 H. 6. cap. 10. He that is in Execution upon a Statute Staple, shall not be delivered upon a Scire Facias against the Party, and Surety there upon found to the King alone, but shall find Sureties severally, as well to the King, as to the Party.*

23 H. 8. cap. 6. Each of the Chief Justices, or in their Absence out of Term, the Mayor of the Staple of Westminster, with the Recorder of London, may take Recognizances, and it shall be executed in all Respects, as a Statute-Staple.

Vide 27 Eliz. cap. 4. Every Statute Merchant or Staple, shall within six Months next after the Acknowledgement thereof, be entered in the Office of the Clerk of

of the Recognizances. And if the Conusee, (his Executors, or Administrators, do not carry the said Statute to the said Clerk, within four Months next after the Acknowledgement, to be so entered, then the said Statute shall be void.

Vide 32 H. 8. cap. 5. *A Re-extent given upon Land in Execution upon a Statute Merchant, Staple, or Recognizance lawfully evicted before all the Debt and Damages are satisfied.*

These Courts do not sit but in Term.

The whole Year having four Terms, and every Term several Days of Return.

If the Day of the Return, or if the first or last Day of Term happen upon the ^b *Sabboth-Day*, then the Day next following, shall serve instead thereof.

The Term of *Saint Michael*^c, which commences the 9 October, and ends the 28 November, and hath eight Returns, *the Octave of St. Michael, the Day of St. Michael in fifteen Days, St. Michael in three Weeks, St. Michael in one Month, the Morrow of all Souls, the Morrow of St. Martin, the Octave of St. Martin, Fifteen Days of St. Martin.*

The Term of *St. Hillary*^d, which commences 23 January, and ends 12 February, and hath four Re-

^b In all the four Terms, the Sabbath Day is not Dies Juridicus. *Mirroure*, cap. 5. *Plowd.* 265. *Co. Litt.* 135. a. ^c Since Finch's Time, this Term has received much Alterations. For by Stat. 16 Car. 1. c. 6. this Term was Abbreviated, so that it commenced the 23 October, and ended the 28 November, for two Returns were taken from it, by that Statute, viz. the Octave of St. Michael, and the Day of St. Michael in fifteen Days, so that afterwards, only six Returns were left to it, which are those that follow in the order they are recited. But by a late Statute of 24 Geo. 2. c. 48. this Term is further Abbreviated, for two other Returns are taken from it, so that it has now only four, viz. The Morrow of All-Souls, the Morrow of St. Martin, the Octave of St. Martin, and in fifteen Days of St. Martin. And Michaelmas Term begins on the said Morrow of All-Souls, which is 3 November (except it be Sunday, and then on the Morrow after) for the keeping of Essoigns, &c. and full Term begins on the 4 Day of the said Morrow of All-Souls, which is the 6 November (except on a Sunday) and ends as usual the 28 November.

^d Continues so to this Day. Note, it always begins that Day eight Weeks on which Michaelmas Term ended.

turns, the Octave of St. Hillary, fifteen Days of St. Hillary, the Morrow of the Purification, the Octave of the Purification.

The Term of *Easter*^e, which commences seventeen Days after the Day of Easter, and ends the Monday next after the Ascension, and hath *five Returns, Fifteen Days of Easter, three Weeks after Easter, one Month after Easter, five Weeks of Easter, the Morrow of the Ascension.*

The Term of *Trinity*^f, which commences and ends and hath *five Returns* but now by the

Statute.

[b]

32 H. 8. cap. 21. *Trinity Term shall commence the Friday next after Corpus Christi Day, and hath four Returns, the Morrow of Trinity, the Octave of Trinity, fifteen Days of Trinity, and three Weeks of the Trinity.*

He, whose Attendance is necessary, (as a ^g Servant to any Judge or Officer of the Court) and every other that hath ^h Suit there, (and although that he be but in coming ⁱ to prosecute, or defend any Plea, Writ, or other Business) shall be discharged of any Arrest elsewhere of their Body, or ^k Goods, which are necessary for Maintenance of the Suit: And ^l this by a Writ of Priviledge, which hath in it a *Supersedeas*.

^e So at this Day.

^f Before the Stat. 51 H. 3. Stat. 2.

Trinity Term began in Octabis Pentecostes, which is the Day after Trinity Sunday; and by that Statute, it appears, to have five Returns, vide the Statute, so that it then ended about 12 of July. But to avoid Infection in that hot Season of the Year, it was Abbreviated by the 32 H. 8. cap. 21. so that for the future, it should have only four common Days of Return (here mentioned) and that its Essoign Day should always be on the Monday after Trinity Sunday (the same Day with in Ocetabis Pentecostes) and that the full Term should commence the Friday next after Corpus Christi-Day, although that Friday should happen to be the Feast of St. John the Baptist, 24 June. Vide Cro. Ja. 16. And this Term ends on the Wednesday Fortnight after it begins, unless it happens to be on the 24 June, and then on the Day after, unde liquet, that this Feast of St. John Baptist, 24 June, is dies non Juridicus, except it be on the Day the Term begins.

^g 35 H. 6. 3. 10 Ed. 4. 5. ^h 38 H. 6. 12. b. ⁱ 27 H. 8. 20. 2 H. 7. 2. b. Goldsb. 34. ^k 34 H. 6. 15. ^l Dyer, 287. pl. 48. Vaugh. 155.

But

But if he ^m be sued in the King's Bench, a *Superse-
deas* doth not lie, because the Pleas are holden before
the King, and therefore he shall be discharged by shew-
ing of the Record, that he is Aceomptant in the Ex-
chequer, or the like.

The Officer to these Courts, is the Sheriff of every
Countyⁿ, and to him all their Writs shall be direct-
ed, altho' it be of a Matter within a Franchise, in
which Case the Sheriff shall command the Bailiff of the
Franchise, that he serve it as the Servant of the Sher-
riff, and the Sheriff shall make the Return. And al-
though the Sheriff himself serve an Execution in a
Franchise, yet it is good, and the Lord of the Fran-
chise is put to an Action upon the Case against the
Sheriff, for the Sheriff is the immediate Officer. But
in a Place exempt from any County (as the Palace
of Westminster is) the Writ shall be directed to the
Keeper of the Palace, for he is the immediate Offi-
cer to the Court, and in Nature of a Sheriff.

* Against the Sheriff's Return, no Averment shall
be taken, only ^o *in favorem Vitæ*, or when ^p the Par-
ty cannot otherwise have the Effect of his Suit,
as upon a *Cepi Corpus*, returned that he is dead in
Prison, or when he shall ^q lose his Inheritance, as up-
on [†] Vouchee returned dead, the Tenant shall have
Averment against it for the saving of his Inheritance,
that is the Warranty. And all this is to be intend-
ed in the same Action, for in another Action, viz.
Action upon the Case against the Sheriff, a Man shall
have a direct Averment to the contrary.

Upon good Cause of Exception to the Sheriff, the
Writ shall be awarded to the Coroners of the County.

The Suit hath two Parts, the Action, and that which
determines the Action.

^m 9 Ed. 4. 53. b. Bro. 2. pt. 267. ⁿ 2 H. 6. 7. * 4
Ed. 2. Fitz Averment, 44. 2 H. 4. 14. 5 Ed. 4. 2. Jenk.
Cent. 143. ^o Dalton's Sher. 191. Dyer, 349. a. V. Ibid.
212. pl. 36. ⁱ Ed. 3. 24. Jenk. 143. 2 Rol. Abr. 462. pl. 3.
^p 3 Ed. 4. 20. Bac. Mac. Reg. 6. Dalt. 190. ^q 3 Ed. 4. 26. Dalt.
190. 1. [†] 14 Ed. 3. cap. 18. ^r 5 Ed. 4. 2. Dal. 191.

Action is that which draws a Thing in Judgment : whereof there are two Parts, the Commencement of the Suit, and the Proceeding.

[53] The Commencement of the Suit *, is always by Writ Original out of the Chancery, being ever open under the great Seal of England *Teste Rege*, returned before them, that is to say, in the Court which holdeth Plea thereof, be it the King's Bench, Common Pleas, or the Chancery itself, for ^s until it is returned, the Suit is not said depending ; nor can the Courts hold Plea but upon an Original returned before them. And therefore an Original returned *tarde* (that is, *the Writ came so late, that I could not make Execution thereof*) an *Alias* and *Pluries* shall issue out of the Court where the Original is returned, *Teste* the Chief Justice, for by the Return the Court is possessed, but if no Return be made, the *Alias* and *Pluries* shall issue out of the Chancery.

Statutes.

Vide Westminster 2. cap. 24. *Where there is a Writ in one Case, and not in the like Case, the Clerks of the Chancery shall agree upon a Writ, or it shall be referred to the next Parliament.*

A Writ^t so called, because it comprehends briefly the whole Matter, and is a Letter in ^u Latin, in the Name of the King, wrote in Parchment, sealed with a Seal, and except in the Case of a Writ of Right Patent, inclosed in the Seal. These Writs have a Salutation, *The King to the Sheriff greeting* ; and a Conclusion, which is called the *Teste*, because it expresses the *the Name of the King* himself, if it be out of the Chancery, and if out of other Courts, then *of the Chief Justice* of the Court, to be a Witness to the same ; *the Place*, as at *Westminster*, or the like ; and the *Time*, that is to say, the Day and Year of the making thereof.

* 18 H. 8. 5. ^s Ibid. 21 Ed. 4. 55. a. 5 Co. 47. b. 10 Ed. 4. 19. a. 2 Inst. 329. 7 Co. 30. a. 2 Sid. 94. Hutton 4. ^t Co. Litt. 73. b. ^u At this Day all Writs, Process, Pledges, &c. are in English by force of the Stat. 4 Geo. 2. c. 26. 6 Geo. 2. cap. 14.

The Writ Original, so called, because this first brings the Matter in Suit, commands the Sheriff, that if the Plaintiff finds to him Pledges, that is, any Men to be his Sureties, that he will prosecute the Suit, then to execute such Process, as in the Writ is mentioned, against the Defendant, to be before the Justices at a certain Day, to answer to the same. And such is the Form of every Original, *If A. the Plaintiff, shall make you secure of prosecuting his Claim, &c.* and the Entry is, *Pledges of prosecuting, are John Doe and Richard Roe.*

Where Actions demand any Thing to be rendered or done, it is to be executed, if the Defendant do not render, or do the Thing; in others, which complain only of any Thing done, which ought not to be done, or of any Thing undone which ought to be done, it is to be executed without any such Condition. And therefore every Original Writ is, *If A. make you secure of prosecuting his Claim, then, &c. summon, or put by Pledges, or the like, as the first Process is.* And in Actions demandatory, the Writ does always commence with a *Præcipe*, that is to say, *The King to the Sheriff greeting, command A. that he render to B. one Messuage, &c. or 100 s. &c. or command A. that he do to B. the Customs and Services, or that he permit B. to have Common of Pasture, &c. and if he do it not, and the afore-said B. shall make you secure, then, &c.* In the others, the Writ commences with, *If he shall make you secure, that is, The King to the Sheriff greeting, If A. shall make you secure, &c. then, &c.* [b]

The Pledges of prosecuting, if they be not found to the Sheriff, or in Chancery before, may be found in Court, where the Writ is returned.

^a The Servants of the King in his Court, and others, by the especial Grace of the Chancellor, may be admitted here to find Sureties in the Chancery; and then the Form of the Writ is, *Because the afore-said (the Plaintiff) hath made us secure of prosecuting his Claim, by C. of the County of L. and D. of the County of S. summon, &c.*

A

^a Regist. Orig. 228. a.

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^b A poor Man, instead of Sureties, shall give his Faith that he will prosecute. Wherefore the Form, as to him is, *And if he do not do it, and the afore-said A. (the Plaintiff) shall make you secure of prosecuting his Claim by his Faith, because he is poor.*

The ^c Writ must be brought in the County, that is, directed to the Sheriff of the County, where the Cause of Action arises; as in ^d Action of Debt upon an Escape, it may be laid in the County where the Arrest or Escape was, but not in any other County. Trespass^e of Battery, Goods carried away, or Writings broken, may be in any County, for these are not local: Otherwise, it is of Grass trodden down, Trees cut down, or the like; these shall be brought in their proper County. If the Suit be by Bill^f the County is put in the Margent.

It ought to be true ^g Latin; for if it be ^h *habeas ibi bos breve*, or *Uxore*ⁱ in a *Præcipe quod reddat* by a Feme, where it ought to be *Uxor*, or the like, the Writ shall abate.

It shall be also ^k Formal, that is to say, the General to be put before the Special, the Whole before the Moiety, or Part, the more Worthy before the less Worthy, and the like. Vide Lib. 1. Rule 30, 31. Ante. fo. 7. a. b.

It ought also to express the Name of Baptism and the Surname, or in lieu thereof, the Name of Dignity, both of the Plaintiff and Defendant, but not the Name of his Office, which is not any Dignity, as *Præcipe quod reddet*^l *Johanni Duke of Lancaster*, is good, but not to *John*^m *Rector of Dale*, without expressing his

^b Regist. Orig. 228. a. Bro. Pledges, 29. ^c Hobart, 196.
^d 14 Ed. 4. 3. a. Bro. Escape, 36. 30 H. 6. 6. a. b. Dyer, 278. pl. 5. Plowd. 37. 15 Ed. 4. 18. Bro. Lieu. 33. 7 Co. 2 a. 2 Rel. Abr. 602. ^e 2 Mar. Bro. Attaint. 104.
^f Bro. Bill. 35. ^g Ante. 50. a. 1 Ed. 3. 4. 1 H. 6. 16. b. 4 Co. 39. b. 5 Co. 45. a. 121. a. 7 Co. 27. b. 8 Co. 159. a. 9 Co. 48. a. 10 Co. 132. b. ^h 9 H. 7. 16. Bro. Faux. Latin, 78. Bro. Amendment, 62. Bro. Obligation, 71. ⁱ 3 Saund. 39. 2 Vent. 173. 3 Salk. 30. 8 Co. 159. b. ^j 3 Ed. 6. 86. ^k 1 Ed. 3. 4. ^l 8 Ed. 4. 24. b. ^m 27 H. 6. 3. b.

Surname ; but when an Officer is to be sued, by reason of his Office ; as a ⁿ Prebendary, ^o Parson, ^p Executor, ^q Guardian by Knight's Service, &c. there it ought to express the Name of his Office. So where a ^r Man brings an Appeal of Murder, as Brother, or Heir, &c. As to Corporations, the Name by which they are incorporated is as their Name of Baptism, and therefore they shall sue and be sued thereby ^s, as *Command that he render* to the Mayor and Commonalty of London, &c. or to the Dean and Chapter of Dale, &c.

Statutes.

[54]

1 Ed. 6. cap. 7. *Acceptance of a new Name of Dignity shall not abate the Writ.*

Where ^a there are many Men of the same Name, the Diversity of Names ought to be put by Addition of eldest or yougest, &c. otherwise the Writ shall abate. And ^b if a Man be molested by Reason of a Suit against another of the same Name, as if he be taken by a *Capias* or *Exigent* awarded against the other, or distrained by Process out of the Exchequer, he shall have a Writ *De Idemtitate Nominis*, directed to the Sheriff or Escheator (if he is vexed, or his Goods taken by any of them) to surcease the same against him or his Goods.

Also this Writ may be directed to the Justices themselves, as a Commission to make Inquiry ; and hereupon they shall award a Writ of Inquiry.

The Form is, *Whereas A. B. of London, Taverner, &c. was outlawed, and now on the Behalf of A. B. of London Baker we have understood, that altho' he is not the same A. B. who was outlawed, yet, &c.*

Statutes.

Vide 37 Ed. 3. cap. 2. *A Man in such Case shall have a Writ of Idemtitate Nominis, as it has been used in Time past.*

9 H. 6. cap. 4. *The Executors of him who hath the like Name as he that is outlawed in Truth, shall have this Writ if the Goods of their Testator are taken.*

ⁿ 13 Ed. 3. Fitz. Brief, 675. in Action real. ^o 12 H. 4: 20. in Affize. ¹⁰ H. 7. 5. in Wast. 18 Ed. 4. 17. in Annuity.
^p 30 H. 6. 5. ^q 9 Ed. 3. 465. ^r Dyer, 50. pl. 9.
^s 27 H. 6. 3. b. ^a 37 H. 6. 29 b. ^b F. N. B. 267. e.
Vid. Stat. 37 Ed. 3. cap. 2. recites the Law so.

If

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^e If the Defendant do not appear upon the Proceſs in the Original Writ ſerved, other Proceſs ſhall iſſue out of the Court where the Original is returned, until he appear, or that all the original Proceſs be determined.

^d He whoſe Attendance is neceſſary in any Court, as the Officers and Attornies, ſhall ſue, and ſhall be ſued there (that is to ſay of ^e Things whereof the Court hath Power to hold Plea) in manner of Complaint, without Writ Original, which is called a Bill of Privilege; but altho' the Cook and Butler of the Judge, or of other Officers of the Court, ſhall have their Priviledge, if they are ſued in another Place, yet a bill ſhall not lie againſt them; but againſt the Officers of the Court and Attornies it lies, for they are Members of the Court, and their Attendance is neceſſary, and they ſhall be fore-judged of their Offices, if they make default, being demanded to do them; but an Attorney in the King's Bench ſhall not be ſued by Bill, for no Attorney is there of Record, nor is his Preſence neceſſary; otherwiſe it is in the common Pleas. The Form is, *A. one of the Clerks, &c. according to the Liberties, &c. complains of B of a Plea, that he render to him 13 s. 4 d. &c. or, A complains of B, one of the Attornies of the Common Pleas here preſent in Court, of a Plea, &c.*

[b]

^f And if an Attorney or Filizer of the Common Pleas be impleaded in London, he may ſay, that it has been uſed, &c. that he ſhall be impleaded in the Common Pleas, and no where elſe.

Such is the Commencement of the Suit. The Proceeding, until Judgment, conſiſts of two Parts, the Parol and the Proceſs. And this is proved by the Form of the Writ of Error, ^g *because in the Record and Proceſs, and the giving of Judgment of the Pleint, &c.*

The Parol, which is called the Pleint, is that which depends in Plea, viz. all the Time until Judgment; for after ^h Judgment the Suit is not ſaid depending. ⁱ And

^e 18 H. 8. 5. ^d 6 Ed. 4. 3. V. Ante, 52. b. ^e 2 Ed. 3. 18. ^f 11 Ed. 4. 3. ^g Regiſt. Orig. 216. b. F. N. B. 24. d. 8 Co. 157. b. ^h Dyer, 220. b. 1 Rol. Abr. 290. pl. 6. ⁱ 8 Co. 157. b.

all this is entred of Record in a Roll, which is called the Plea Roll; but the Entry of the Original Writ in the Roll is but superfluous, forasmuch as the Writ remains always of Record, and is sufficient by itself, but it shall not have any Roll, altho' the contrary is used†.

Statutes.

36 Ed. 3. cap. 15. *All Pleas in whatsoever Courts shal be pleaded, shewn, and defended, answered, debated, and adjudged, in English, entred and inrolled in Latin*.*

* Variance in any Part of the Record of the original Writ shall be amended at any Time.

Statutes.

14 Ed. 3. cap. 6. *For Misprision of Clerks in any Place, wheresoever it be, no Proceſs shall be annulled nor discontinued by mistaking in writing one Syllable or one Letter, too much or too little, but it shall be amended.*

9 H. 5. cap. 4. *The Justices before whom such Plea or Record is depending, by Adjournment, Writ of Error, or otherwise, may amend the same, as well after Judgment, as before.*

4 H. 6. cap. 3. makes 9 H. 5. cap. 4. perpetual; but it shall not extend to Records and Proceſs upon which a Man is outlawed.

8 H. 6. cap. 12. *For Error in any Record, Proceſs, or Warrant of Attorney, Writ Original or Judicial, Pannell, or Return, in any Places rased or interlined, or in any Addition, Subſtraction, or Diminution of Words, Letters, Titles, or Parcell of Letters found in any such Record, &c. which to the Judges do appear suspected, no Judgment nor Record shall be reversed or annulled. But the Judges may examine it, and amend in Affirmance of the Judgment all that which to them seems the Misprision of the Clerk, except in Appeals, Indictments of Treason, Felony, and Outlawries of the same; and the Substance of proper Names, Surnames, and Additions left out in Writs Original, and Writs of Exigent. Upon any Record, Proceſs, Writ or Warrant of Attorney, Pannell, or Return, or Parcell of the same exemplified in Chancery, without any Rasure, Judgment shall not be reversed or annulled* [55]

† 7 H. 6. 45. * Vide Stat. 4. Geo. 2. cap. 26. 6 Geo. 2. cap. 14. k 7 H. 6. 45. Bro. Amendment, 34. 8 Co. 156. b.

for any Matter in the Record varying from the Exemplification.

8 H. 6. cap. 15. *The Justices before whom any Mispri-
sion is found in Records and Processes depending before them,
as well by Error, as otherwise, or in Returns in writing
one Letter or Syllable too much or too little, may amend the
same by Examination; but this shall not extend to Process
and Records of Outlawry of Felonies, and Treasons, and
the Dependancies thereof*¹.

^a Of the Record of the Paroll there are two Parts,
the Count, and Pleading.

The Count is a Declaration, against the Party, of the
Cause of the Suit comprehended in the Writ. And
therefore this ought to be ^b certain as to the Time,
Place, and the Quantity of the Land, &c. and ^c also it
ought to pursue the original Writ, as in a Formedon
of four Acres, if he count but of one, the whole Writ
shall abate, ^d for the Writ is not pursued. In ^e Appeal
of Murder, the Plaintiff shall not declare that the De-
fendant treacherously killed the Party, as he was going
to aid the King in his Wars, with twenty Men in
his Company, &c. for the Writ supposes no Treason.

The ^f Count shall never be made until the Writ is
served.

The Form is, *A. B. was summoned to answer C. D.
of a Plea, that he render to him 20 l. which, &c. And
therefore he says, that whereas the aforesaid A. the Day,
&c. Year, &c. at, &c. by his certain Writing obligatory
granted himself to be bound, &c. in the aforesaid, &c.
to be paid to the same C. on the Feast, &c. Nevertheless
the aforesaid A. hath not paid, &c. Wherefore he says that
he is damaged and hath Damage to the Value, &c. And
thereof he brings Suit.*

¹ Vide the Statute 5 Geo. 1. cap. 13.

^a 8 Co. 161. a.

^b Brañ. 1. 2. fo. 140. Termes de Ley ad v. Declaration. 3 Ed. 4.

21. Bro. Count, 63. 38 H. 6. 1. Bro. Count, 54. 3 H. 7. 11,

12. Ibid. 58. 7 Ed. 4. 24. b. Plowd. 84, 121, 122, 202. Co.

Litt. 303. a. 5 Co. 120. b. 2 Bulstr. 77, 78. 2 Sid. 175.

^c Co. Litt. 303. a. Doc. Pla. 83. ^d 8 Ed. 4. 2. b. ^e 45

Ed. 3. 25. ^f 21 H. 6. 21. Newton.

Statutes.

36 Ed. 3. cap. 15. *The Count shall be good if it bath Matter of Substance, altho' the Terms are not apt.*

Next follows Pleading.

Sometimes the Party confesses the Matter, or will not say any thing to it, (which is called *Nibil dicit*, and is in Nature of a Confession) and this is peremptory, that [b] is to say, in such Cases Judgment shall be given against him, without more doing, in all Actions. The Entry of Confession is, *And the same C. (the Tenant) says, that he cannot deny the aforesaid Action of the aforesaid A. but that the said Messuage with the Appurtenances is the Right of the said A. in Form, as he the same A. by his Writ and Declaration aforesaid above supposes. Therefore, &c.*

The Entry of *Nibil dicit* is, *And the aforesaid C. (the Defendant) comes, &c. and says nothing in Barr or Praelusion of the Action aforesaid of the aforesaid W. whereby the same W. remains against the aforesaid C. without Defence. Wherefore, &c.*

Every Plea^a, as well Pleas to the Jurisdiction, in Disability of the Person, in Abatement of the Writ, as Barr, Replication, Rejoinder, Surrejoinder, &c. ought to be averred to be true, as to say in the End of the Plea, *And this he is ready to verify*; which we call an Averment: But there needs no Averment in^b Avowry, for it is in lieu of the Count and Declaration; and an Avowant is in a manner the^c Actor and Plaintiff, and to have a Return.

Advantage of a Matter, which may not be pleaded, shall be saved by^d Protestation of not knowing it to be true, altho' the Matter pleaded pass against him; as if an^e Infant brings an Action of Waste against his Guardian, and appears by Attorney (which none may do but he that is of full Age) if the Guardian

^a That is, in the Affirmative; for Negative Pleas ought not to be averred. 9 H. 7. 2. Bro. Pleading, 135. 27 H. 6. 14 H. 8. 27. Per Brooke, Averment, 20.

^b 3 Mar. 1. Bro. Averment, 81. 27. H. 8. 27. Plowd. 163, 342. Co. Litt. 303. 2. Doc. Pla. 49, 50.

^c 2 Inst. 339, 340. ^d Quid est. Vide Co. Litt. 124. b. Doc. Pla. 295. Termes de Ley. ^e 48 Ed. 3. 10. b.

takes his Non-age by Protestation, because he may not plead it, this shall save him that he shall not be at any Mischief. ^f But in Detinue by the Executor of A. the Defendant shall not take by Protestation that A. hath not made the Plaintiff his Executor, for this is the very ^g Ground of the Suit, and may be denied by Answer, and Issue to be joined upon it; and a Protestation is only a saving to the Party who takes it, from being concluded by any Matter alledged against him, whereupon he may not join Issue. The Form is, *And the aforesaid A. by protesting that the aforesaid S. did not die seized, &c. as the aforesaid C. hath above alledged, for Plea says, that, &c.*

Pleas are the first Pleas of the Defendant where the Entry is, *the aforesaid A. (the Defendant) comes and says, &c.* or the interchangeable Pleas of both.

The first Pleas of the Defendant are before the Count entered, or after.

Before, are Pleas to the Jurisdiction, or in Disability of the Person ^h.

ⁱ In both, the Defendant shall first defend the Wrong, where any special Thing is alledged in the Writ (but not in Dower, Affize, or the like, where it is but by Allegation without) as to say in the Commencement of his Plea, *A. (the Defendant) comes and defends the Force* [56] *and Injury, &c. and says, &c.* The Reason hereof is, ^a because before the Defence he is an entire Stranger, and not of Ability to plead.

To the Jurisdiction, when the Court ought not to have Conusance. The Form is, *And the aforesaid A. by, &c. comes and says, that the Land is ancient Demesne, &c. or the like: Wherefore he prays Judgment, if the Court of the Lord the King here of the Plea thereof will ^b have Conusance.*

^f Plowd. 276.

^g Cro. Car. 365, 366. Doc. Pla. 296.

^h 18 H. 6. 18. b.

ⁱ 34 H. 6. 33. b.

^a 14 H. 6. 18. Co.

Litt. 127. b. Yelv. 210. but at this Day it seems, by the Practice

of the Courts, that a Plea without Defence is only Matter of Form.

Vide 2 Lutwy. 1594. 1 Lord Raym. 282. Carth. 221. Per 3.

Judges.

^b Ante, 14. b. Rast. Entr. 101. a. pl. 3. 1 Mod.

Entr. 2.

To the Person, when the Plaintiff ought not to be answered; the Form is; *And the aforesaid A. by, &c. comes, &c. and says, that the aforesaid B. to his Writ ought not to be answered, because he says, that B. is an Alien born in the Kingdom of France, &c. born, &c. and this he is ready to verify; wherefore he prays Judgment, if the aforesaid B. to his Writ aforesaid ought to be answered.*

After the Count, the Defendant, for his Aid to plead better, shall have Oyer, if he demand it, of every thing which is not parcel of the Record; as of the Writ, and Return thereof, of an Obligation, and the Condition, and the like. The Form is, *And the aforesaid R. by, &c. comes, &c. and prays Oyer of the Writing aforesaid, and it is read to him, &c. He also prays Oyer of the Indorsement of the same Writing, and it is read to him in these Words, The Condition of the said Obligation, &c. which being read and heard, the same R. says, &c.*

In the Pleas after the Count, the Defendant may make full Defence of the Wrong, and Force and Damages, as to say, *he defends the Force and Injury, when, &c.* For this Word (*when*)^d goes to the Damages, and is a full Defence; but after such full Defence, he shall not plead to the Jurisdiction, nor to the Person^e.

Such Pleas are dilatory, or in Barr.

Dilatory, which do not tend to barr the Plaintiff of his Action.

In an Action against many, all shall join in pleading of Dilatories; for in a *Præcipe quod reddat*, one Defendant shall not demand the View, and another pray in Aid; neither shall one pray in Aid of one Man, and another of another Man^h.

Dilatory Pleas are in Abatement, or other Delays:

In Abatement, are those which alledge any Fault in the Count, or Writ. The Form is, *And the same D. says, that he cannot render to the aforesaid A. the Manor*

^c Rast. Entr. 252. pl. 7. Lilly's Entr. 1. 1 Mod. Entr. 9.
^d 9 H. 6. 1. Bro. Defence, 21. Co. Litt. 127. b. ^f 2 Ed. 4.
 15. Bro. Defence, 20. 1 Mod. Entr. 26. 2 Show. 443. For by
 the full Defence he admits the Jurisdiction. Co. Litt. 127. b.
^e 40 Ed. 3. 36. Ib. 21. 35 H. 6. 12. Ibid. 11, 12. Littlel.
 §. 195. Rast. Entr. 252. b. pl. 7. Carth. 230. ^h 12 H. 7. 3.

*aforesaid with the Appurtenances, * because he says that he is not Tenant thereof, as of Freehold, nor was the Day of obtaining the Writ aforesaid, nor ever after. And this he is ready to verify: Wherefore he prays Judgment of the Writ, &c.*

And first ¹ a Man shall plead in Abatement of the Count, and afterwards in Abatement of the Writ; but after a Plea to the Writ he shall not plead to the ² Count, or to the Plein in Affize; but to Matter ¹ of the Count he may.

[b] Amongst Pleas to the Writ, ² those which arise upon the View of the Writ shall be pleaded before those which arise out of it, as Non-Tenure, Several-Tenancy, &c.

If the Writ abates for any thing, without Folly in the Plaintiff, (as for False ^b Latin, Non-summons ^c of the Sheriff, ^d Jointenancy, or the like, but not for ^a Non-tenure, or ^e naming of one Esquire, when he is a Knight), if he himself purchase another Writ ² freshly in the same Court against the same Defendant (this is called a Writ by *Journies Accompts*) he shall have all the Advantages of the first. For he shall recover ² Costs for the first Suit; the Defendant being ¹ Executor shall be charged with Affets that he had the Day of the first Suit; if he was Tenant ^k the Day of the first Writ, he shall not plead Non-tenure now; if Sole ¹ Tenant, then he shall not plead Jointenancy; if ^m Jointenant, then he shall not plead Several-tenancy. But no Writ by

* Vide Lilly's Entries, 93. ¹ 30 Ed. 3. 20. ⁴ Ed. 3. 136.
^k 4 Ed. 3. 134, 5. ¹ 24 Ed. 3. 47, 35. ^a 3 Ed. 3. 70.
^b 38 Ed. 3. per 46 Ed. 3. 14. ²⁵ Ed. 3. 54. ²⁶ Ed. 3. Fitz. Q. Imped. 163. ¹⁴ H. 4. 23. ²² H. 6. 62. ¹³ H. 4. Fitz. Executors, 118. ⁶ Co. 10. a. ^c 46 Ed. 3. 14. b. ⁴ Ed. 3. 130.
⁸ Ed. 3. 377. ⁴² Ed. 3. 16. ²² Ed. 3. 15. ¹⁴ H. 6. 4. ²¹ H. 6. 8. ²² H. 6. 62. ¹¹ H. 6. 42. ⁶ Co. 10. a. ^{Sed.} 41 Ed. 3. 2. ⁷ H. 4. 8. ²² H. 6. 46. are contrary. ^d 32 H. 6. 24. ³³ H. 6. 2. ¹⁷ Ed. 3. 39. ³⁸ Ed. 3. 16. ⁴¹ Ed. 3. 4. Kelwey, 127. b. ⁶ Co. 10. a. ^{Cro.} Ja. 218. ^e Viz. of the whole.
³³ H. 6. 3. ⁶ Co. 10. a. ^f 33 H. 6. 3. ⁶ Co. 10. b. ⁸ Vi-
 de 18 Ed. 3. 24. & 32. Ed. 3. Fitz Journies Accounts, 16. that 15
 Days were allowed. ^h 9 Ed. 4. 5. Kelwey, 127. b. ⁶ Co. 10. b.
¹ 2 H. 4. 21. Bro. Affets inter Maines 4. ^{Ib.} Journies Ac-
 co. 8. ^k 46 Ed. 3. 14. b. ¹ 41 Ed. 3. 4. ^m 41 Ed. 3. 16.

Journies Accompts ^a lies by one against any other but the same Parties, and in the same Court where the first Suit was. For if ^o the Plaintiff in a personal Action die, his Executor shall not have a Writ by Journies Accounts: And if two ^p Coparceners bring a *Formedon*, and the one die, for the other as Heir to the Father a Writ lies of the whole by *Journies Accounts*; but for her as Heir to the Sister of her Part it doth not lie. So where the ^q Tenant in a *Præcipe* dies (that is to say, upon a Writ of Dower, or the like, brought) no Writ lies by *Journies Accounts*. But in a ^r *Præcipe quod reddat* by two Jointenants, and the one dies, by which the other hath all by Survivorship, there it lies. Lastly, ^s upon Affize of Fresh-force abated in the Franchise, a new Affize by *Journies Accounts* may not be in the Guild-hall before the Justices of Affize. The ^t alledging of the Writ purchased by Journies Accounts, is always either by way of Counterplea to oust the Tenant of Voucher, or (which is more common) by way of Replication to oust the Tenant to plead Non-tenture, or Jointenancy, or any other Plea which arises on Matter after the Date of the first Writ. The Entry in the Replication is, (^w reciting the former Writ, that the same abated, and shewing all in Certainty) *upon which* (the Demandant) *by Journies Accounts freshly brought a certain other Writ, &c.*

The other Delays are those which do not take advantage of any Fault in the Count or Writ, as *View*, *Aid*, *Prier*, and the like, of which shall be spoken in their Place.

Pleas in Barr are those which tend to barr the Plaintiff of his Action. The Form is, *The Plaintiff ought not to have his Action aforesaid.*

The interchangeable Pleas of both are until the Issue, or the Issue itself.

^a 6 Co. 10. b.

^o 4 Ed. 6.

Bro. Journies Accounts, 238

^p 7 H. 6. 16. 23.

^q 14 H. 4. per 7 H. 6. 34. b.

^r 7 H.

6. 23.

^s 8 Aff. pl. 5.

^t 6 Co. 10. b.

^w 6 Co.

10. b.

[57]

PREROGATIVE.

The King may alledge in his Count or Plea, double Matter, or how many Matters he will, and the Party shall answer to them all, and the King shall take Issue upon which of them he will. 16 H. 7. 12. Plowd. 243.

Until the Issue; which are to draw the Matter to some Issue. And therefore Departure is a Fault in pleading. ^a Departure is, when he doth not fortify the Matter of his Plea before, but

comes in with a new Matter; as if the Rejoinder contain a Matter that is later, or under the Matter of his Barr, and not above or paramount it; ^b as in an Action of Trespass the Defendant pleads a Descent to him, the Plaintiff says, that after the Descent the Defendant infeoffed him; now if the Defendant rejoin, that the Feoffment was upon Condition, and he entred for the Condition broken, this is a Departure; for the Matter of the Barr, which is the Descent, is before the Matter of the Rejoinder, that is to say, the Entry for the Condition broken, which avoids the Feoffment. Same Law, ^c if in Assize the Defendant pleads a Feoffment of J. S. and the Plaintiff makes Title to him by Descent, and that he was disseized by J. S. who infeoffed the Defendant, or that he infeoffed J. S. upon Condition, who broke the Condition, and afterwards infeoffed the Defendant, &c. Now if the Defendant say, that after the Disseizin (or Condition broken) and after the Feoffment of J. S. to the Defendant, the Plaintiff released to the Defendant, or confirmed the Estate of the Defendant, this is a Departure, for this is a Matter which arises after the Feoffment pleaded in Barr; but if he plead ^d such Release or Confirmation of the Plaintiff to J. S. and that after this J. S. infeoffed him, this is not a Departure, for it is a Matter before the Feoffment. For altho' the Defendant might have pleaded such Things at the beginning, yet inasmuch as this pursues and fortifies his Barr, and does not contain Matter later and under the Title of his Barr, but elder and above the Matter of his Barr, therefore it is not a Departure. So a Plea in Barr (which is intended at the Common

^a Termes de Ley. Co. Litt. 304. a. Doc. Pla. 119. ^b 6 H. 7. 8. Per Rede Fitz. Departure, 10 Plowd. 7. 8. Co. Litt. 304. S. P. ^c 6 H. 7. 8. Per Keble, Plowd. 105. Doc. Pla. 120. ^d Plowd. 105. Co. Litt. 304. a. Doc. Pla. 120.

Law) ^e shall not be maintained with Matter of Custom, or by Statute Law; as in an ^f Affize the Tenant pleads in Barr a Devise made to him of the Land being deviseable by Custom, the Plaintiff says, that the Devisor was within Age at the Time of the Devise; now if the Tenant say, that by the Custom there an Infant of 15 Years of Age may make a Devise, this is a Departure, for the Custom pleaded in Barr shall be intended of them who may make a Devise by the Common Law. So if the Defendant in Trespass plead in Barr a ^g Lease for 50 Years of Land belonging to a House of Religion, and the Plaintiff avoid it because it was made within a Year before the Dissolution, and so void by the Statute of 31 H. 8. Now if the Defendant say, that by the same Statute it is provided, that all such Leases shall be good for 21 Years, and so maintain the Lease to be good for so many Years; or if one plead a Fine, ^h and, the same being avoided because the Parties to the Fine had nothing, will maintain the Fine to be good by the Statute of 1 R. 3. because he that levied the Fine was Cestuy que Use; all these are Departures.

Also when ^a Matters are pleaded which offer several Issues, this is termed a double Plea, and is a Fault in Pleading; as in ^b Affize to plead the Feoffment of an Ancestor with Warranty; in ^c Debt upon a simple Contract to plead Payment and an Acquittance; otherwise in Debt upon an Obligation. In ^d Affize to plead divers Descents of Land in Fee-simple is double; for each of them requires a several Answer; but to plead divers Descents in Tail is not double, for one Answer makes an end of the whole, that is to say, to traverse the Gift in Tail, so that the Matter may not come but to one

^e Co. Litt. 304. a. Doc. Pla. 120. Plowd. 105. 21 H. 7. 25.
 21 H. 7. 17. 27 H. 8. 5. 37 H. 6. 5. 38 H. 6. 25. 6 H. 7. pl.
 4. 1 Lev. 81. Yelv. 14. 1 Sid. 142. T. Raym. 60. ^f 37
 H. 6. 5. Bro. Departure, 9. Yelv. 14. S. P. Doc. Pla. 123. T.
 Raym. 60. ^g Plowd. 105. Doc. Pla. 121. Dyer, 103. a.
^h Doc. Pla. 121. Dyer, 291. a. ^a Plowd. 139. Co. Litt.
 304. a. Doc. Pla. 135. Termes de Ley. ^b 14 H. 8. 24. Bro.
 Double Plea, 32. 14 H. 4. Ibid. 38. Ibid. 117. 32 H. 6. 21.
 11 H. 8. 3. b. Doc. Pla. 140. ^c 1 H. 7. 16. ^d 19 Ed. 4. 4.
 4 Ed. 4. 3. Plowd. 140.

Issue. So in an ^e Action of Debt against an Executor to plead *fully administred, and so nothing in his Hands*; for one Answer, *Assets in his Hands*, suffices. In the same Manner it is of two or three Matters with the general Conclusion, ^f as in Debt upon an Obligation to say that he is unlettered, and that the Deed was read to him in other Manner, and besides, that he delivered it upon Condition which is not performed, so not his Deed. So to justify an ^g Arrest for twenty Causes of Suspicion of Felony, is not double, for one Answer serves, *of his own Wrong*: Nor to assign in a Writ of Error ^h so many Errors as appear in the Record, for *in nullo est erratum* answers to all: But to assign divers Errors in Fact, is double, for it shall be tried by the Country. And the Reason of all this is, because upon ⁱ divers Issues joined, if one should be found for the Plaintiff, and the others against him, the Court should be inveigled, and should not know how to give Judgment for or against the Plaintiff. But to plead a Feoffment with Warranty, and ^k rely upon the Warranty, is not double; for he may not plead the Warranty without the Feoffment.

The Matter is brought to an Issue by confessing and avoiding the material Things (as to say, *Well and true it is, &c. but further he says that, &c.* for in Affize, or the like, ^l if the Defendant claims by a Lease made by the Plaintiff to A. who granted his Term to B. and B. to the Defendant, the Plaintiff shall answer only to his own Lease, because the Mesne Assignments are but Conveyances, and not material. But if he ^m derives his Interest from a Stranger who infeoffed B. who infeoffed C. and C. the Tenant, the Plaintiff may traverse any of the Mesne Conveyances, for all are material:) Or by denying the material Things, when he either

^e 3 H. 6. 4. Bro. double Plea, 3. Plowd. 14c. 1 H. 7. 15.
 18 H. 8. 4. Doc. Pla. 136. Kelwey, 37. a. ^f 38 H. 6. 2.
 Bro. double Plea, 80. Doc. Pla. 142. ^g 2 Ed. 4. 9. Plowd.
 86. Doc. Pla. 145. 2 H. H. P. C. fo. 81. ^h F. N. B. 20. e.
ⁱ 3 H. 6. 4. 1 H. 7. 15. b. Plowd. 139. Co. Litt. 304. a.
^k Bro. double Plea, 32, 117, 114. Doc. Pla. 140, 146. Co. Litt.
 229. a. ^l 15 H. 7. 2. b. Doc. Pla. 365. ^m 11 Ed. 4. 26.
 10 H. 7. 8. Doc. Pla. 364, 365. 6 Co. 24. b.

takes the general Issue, *Not-guilty* (in Trespafs) or *he oweth him nothing* (in Debt), or when upon pleading more over to it, he puts a special Contradiction of that which the other says: ^a As in Debt upon an Obligation for Performance of Covenants, and Defendant pleads that he hath performed them all, the Plaintiff ought to shew some in certain which the Defendant hath broken, upon which Issue may be joined: But he shall not say that the Defendant hath not performed all; for in Logic there are three Kinds of Contradiction, *viz.* *general*, when both Propositions are general, as, All the Covenants are broken, None of the Covenants is broken; *particular*, when one Proposition is general, the other is particular, as, None of the Covenants is broken, Some of the Covenants is broken; *proper*, when both the Propositions are proper, as, This Covenant is broken, This Covenant is not broken; the two first do not make any Issue in our Law, but the last only. And the last is for the most part done with a Traverse. The Form is, after alledging what makes for himself, to say, *Without that, &c. in manner as the aforesaid A. (the other Party) above by pleading hath alledged.* [58]

The Pleas until the Issue are Replication, Rejoinder, Surrejoinder, &c.

The Form of ^a Replication upon a Plea in Abatement of the Writ, is, *And the aforesaid C. says, that his Writ aforesaid by reason of any thing before alledged ought not to be quashed, because he says, &c.*

Upon a Plea in Barr it is, ^b *And the aforesaid R. says that he ought not to be precluded from having his Action aforesaid, because he says, &c.*

Of a Rejoinder, Surrejoinder, or the like, the Form is, *And the aforesaid A. (the Plaintiff or Defendant) says, &c.*

Issue is, when both Parties join upon a Thing which they will have to be tried, to make an end of the Suit.

^a Dyer, 184. pl. 62.
ly's Entr. 59, 107, 121.

^a Vide Lilly's Entr. 93.

^b Lil-

PREROGATIVE.

The King may waive his Issue and demurr in Law, or e contra, Plowd. 85, 236, 243, 322. so that it be the same Term, but not in another Term, for then he might do it in infinitum. 13 Ed. 4. 8. Fitz. Prerog 9. Bro. Prerog. 69 Plowd. 236, 243.

by the other; as, *And the aforesaid T. &c. says, that he the Action ought not, &c. because he says, that the aforesaid A. had not Issue the aforesaid I. his Son, as the aforesaid S. by his Writ and Declaration supposes, and of this he puts himself upon the Country. And the aforesaid S. says, that he by any thing, &c. ought not to be precluded, &c. because he says that the aforesaid A. had Issue the aforesaid I. his Son, as he, &c.* For every Issue is made up of an Affirmative and a Negative. Where^d Tender of Issue comes on the Part of the Plaintiff, the Form is, *And this he prays, that it may be inquired of by the Country (or by the Record)*; where on the Part of the Defendant, the Form is, *And of this he puts himself upon the Country (or upon the Record)*.

Afterwards, if any Insufficiency of pleading appear in the Record, be the Issue joined upon it (which is called a Jeofaile) or not, the Parties shall replead, ^e so that the Jury ready at the Barr to pass upon the Issue shall be discharged, and their Repleader shall commence where the first Defect was; as if ^f the Barr be good, and the Replication ill, and Issue taken upon it, Judgment shall be, that the Plaintiff shall make a new Replication, and the Barr shall stand; if the ^g Barr and Replication are both good, but the Rejoinder ill, and Issue is taken upon the Rejoinder, the Defendant shall make a new Rejoinder, and the Replication shall stand; but upon a ^b bad Barr, and a good Replication, and Issue taken upon it, now they shall plead all *de novo*, because the Barr, which is the first Plea, is naught.

^c Co. Litt. 126. a. 11 Co. 10. b. Hob. 233. Cro. Ja. 580. 2 Rol. Rep. 135, 187. Doc. Pla. 187, 192. Cro. Car. 80, 317. 1 Vent. 213. Style, 121, 210, 211. Hill, 29 Geo. 2. B. R. Atherley v. Evans. ^d 26 H. 8. 3. Dyer, 353. pl. 29. Bro. Issues joined, 1. Doc. Pla. 188. Co. Litt. 126. a. ^e 7 Ed. 4. 1. 35 H. 8. Bro. Repleader, 54. ^f 7 H. 7. 3. Bro. Repleader, 31. ^g Ibid. ^b Ibid.

The Entry of Repleader is, *At which Day comes as well the aforesaid A. by, &c. as the aforesaid B. &c. and thereupon the Plea aforesaid being read and understood, it appears to the Court here, that the same Plea is insufficiently pleaded. Wherefore it is * ordered to the Parties aforesaid that they replead, &c.*

If the Issue be upon Things of Record, ^e the Trial is by the Record itself. The Form is, *And the aforesaid A. B. comes and says, &c. The Action ought not, &c. because he says that there is no such Record of Recovery of Debt, &c. as the aforesaid J. S. by his Declaration, &c. supposes, &c. And the aforesaid J. S. says, that, &c. he ought not to be precluded, &c. because he says, that there is such a Record, &c. And this he is ready to verify by the Record. Therefore it is commanded to the said J. S. that he have here on the Morrow, &c. that Record, under the Peril, &c.*

If it be upon Matter of Fact, that is to say, done in the Country (for the Jury shall not be charged with Matter of Law, nor shall such Matter be given in Evidence to them; ^d but if they themselves will take upon them the Conusance of the Law, they may give their Verdict generally, that is to say, where a Verdict may be given at large, as upon an ^e Issue of Nul Tort, Nul Disseizin. So ^f may the Jury of themselves find Matters of Record if they will, altho' they are not given in Evidence; and therefore ^g a Fine or common Reco-

* Dictum est. And so is the Course, adjudged Cro. Jac. 6.

^e 9 H. 6. 79. Bro. Record, 25. 5 Ed. 4. 3. Haidon. Ibid. 56. 20 H. 7. 6. Per Palmes & Pollard. 20 H. 6. 10. 11 H. 6. 42. 19 H. 6. 52. 9 H. 7. 2. a. 16 H. 7. 3. 1 H. 7. 29. b. Plowd. 231. 2 Rol. Abr. 574. Co. Litt. 117. b. 260. 4 Co. 71. a. 6 Co. 15. b. 9 Co. 31. a. Hob. 110. Trials per Pais, 8. ^d 9 H. 6. 38. Littlel. §. 368. ^e 9 H. 7. 13. Per Fairfax. Bro. Verdict, 83. 9 Co. 12. b. 1. And. 37. And so was the ancient Opinion, that the Jury might not give a Verdict at large but in Affize and Trespais, or the like, where the general Issue was pleaded; but the Law is now contrary, and they may give a special Verdict upon any Issue in the World, be the same general or special. Plowd. 92. Co. Litt. 227. b. 2 Inst. 425. Hob. 227. Note, So was the Opinion of Tremaille, 9 H. 7. sup. and of Brook in Abr. S. C. supra. ^f Hob. 227. Trials per Pais, 267. 2 H. H. P. C. 207. Plowd. 410, 411. ^g Ibid. 411.

very

very may be given in Evidence, without shewing the same under the Great Seal, or the Seal of the Court, and without vouching the Roll of the Recovery, for the Jury may find them if they will; but perhaps they are not ^a compelled to find the same upon Pain of Attaint, except it be shewn under the Seal) such Matters are to be tried by the Oath of twelve free and lawful Men of the same County and out of the Neighbourhood where the Thing is alledged to be done, four whereof shall be of the same hundred indifferently chosen: Which we call a Jury, and the making of the Jury is called a Pannel or Array. The ⁱ Jury ought to be twelve, for the Verdict of eleven is void. They ought to be free, ^k not Villains, nor ^l Aliens; lawful, for a Man ^m outlawed shall not be of a Jury, because he is not *legalis Homo*; and of the same County, for upon ⁿ a Trespass local, as Grass trodden down in the County of D. where the Trespass was in the County of S. if the Defendant plead Not Guilty (as he may), and the Jury find him guilty in the County of S. the Verdict is void; but if they find him guilty generally, Attaint lies. But upon an Issue whether Executors have Assets in their Hands, or not, the Jury may find the Assets in any County, for this is a transitory Thing. ^a Also every

[59] Jury shall be of the Neighbourhood of the Place where the Thing is alledged to be done: ^b And four of them shall be of the same hundred; which Number of four is sufficient, altho' it be in Attaint, where the Jury is twenty four; and in an Information upon the Statute of Plurality of Farms, for having seven Farms in seven Towns in four several hundreds, if four of the Jury have

^a Plowd. 411. ⁱ 41 Aff. pl. 11. ^k 26 Aff. pl. 28.
 There are no Villains now, since Stat. 12. Car. 2. cap. 24. ^l 14
 H. 4. 19. ^m 21 H. 6. 30. b. ⁿ Trials per Pais, 205. ^a Co.
 Litt. 125. a. But at this Day much Alteration is made herein; for
 by 4 & 5 Anne. cap. 16. the Venire for the Trial of any Issue in a
 civil Cause shall be awarded of the Body of the County where the
 Issue is triable; also on any Action or Information on a penal Sta-
 tute, by 24 Geo. 2. c. 18. ^b There was some Alteration made
 herein by 27 Eliz. cap. 6. in a Plea personal, where if two Hun-
 dredors appeared, it was sufficient; but now since 4 & 5 Anne, & 24
 Geo. 2. supra, this Matter is out of Use, and Default of any Hun-
 dredors is no Cause of Challenge.

sufficient

sufficient Freehold, or inhabit within any of the four Hundreds, this is sufficient. Lastly, they ought to be indifferently chosen, so that neither the Sheriff who makes it (for this is a good Cause of Challenge to the Pannel or Array) nor the Jurors who are to pass upon the Trial (for this is a good Cause of Challenge to the Polls) bear any Favour or Malice to either Party: As if the ^e Sheriff impanel any Jurors at the Denomination of the Party, if the Sheriff or Juror be his Man ^f in Fee or ^o Servant, or within his ^f Distress, whether it be that he is his Tenant (immediately, or not immediately, as if he ^e holdeth of J. S. who holdeth over of the Party) or not his Tenant, but otherwise within his Distress, as ^h where he is to come to the Hundred Court of the Party, or that the Party hath a ⁱ Rent-charge out of his Land; if he be ^k of Kindred to the Party, for Cousinage in the Sheriff is a good principal Challenge to the Array, and in a Juror to the Poll, altho' it be in the ninth Degree, and that the one may not be Heir to the other of the Land in Dispute, as if the Husband and Wife are vouched (which is intended for the Warranty of the Lands of the Wife) and the Sheriff or Juror be Cousin in the ninth Degree to the Husband; and the Reason hereof is, for the Affection which the Law intends that the Sheriff bears to the other, and for that he may be Heir to the other of the Lands of the other. And for the like Reason it is a good Cause of Challenge in personal Suits also, to say that he hath been an ^l Arbitrator of the other Party in the same Matter, that he hath an ^m Action of Battery depending against the Juror, or the Juror an Action of Debt against him, &c. That the Juror hath ⁿ taken Money for his Verdict, hath given it ^o beforehand, or hath

^e 7. H. 4. 10. 21 Aff. 25. 2 Rol. Abr. 640 pl. 4. Co. Litt. 156. a. 21 Ed. 4. 24. ^d 8 Aff. pl. 23. Co. Litt. 156. a. ^f 21 Ed. 4. 67. b. Co. Litt. ib. 2 Rol. Abr. 638 pl. 17. ^f 20 H. 6. 39. 9 H. 6. Fitz. Chall. 27. ^g 38 Ed. 3. 25. 2 Rol. Abr. 651. ^h 38 Ed. 3. 25. 2 Rol. Abr. ib. Co. Litt. 157. a. ⁱ 15 Ed. 4. 18. b. Bro. Chall. 68. ^k Plowd. 425, 426, 306. 21 Ed. 4. 63. b. ^l 20 H. 6. 39. b. 3 H. 6. 24. Co. Litt. 157. b. ^m 11 H. 4. 26. b. ⁿ 49 Ed. 3. 2. ^o 49 Ed. 3. 1. b.

given^a a Verdict formerly in the same Matter, and all such other Things which of themselves shew Matter of Favour or Malice, and are called principal Challenges. Same Law is of such Things which but induce Favour or Malice, as that he is^a Master, or of^r Council to the Party, or^s Steward of his Manor, or that he^t sued him in an Action of Debt, &c. that he is of the^v same Society, as if both are of Gray's-Inn, or that the^w Juror hath given a Verdict before upon the like Matter.

If the Thing in Issue lies in the Notice of two several Counties, and not of one only (for two^x Counties only shall join, and not more, and two may join altho' they are not the most near, as *Lincoln* and *Essex*) the Jury shall be equally out of both, that is to say, Six out of the one, and Six out of the other.

[b] And this we call a Joinder of Counties; as in^y Action of Trespas, if the Defendant justify for common Appendant to Land in another County, or in a^z Writ of Annuity and Count of Seizin in another County than where the Church is out of which the Annuity is issuing.

If the Defendant in any Action, as in *Homine replegiando*, or altho' it be but in a Writ of Trespas or Debt, plead^b that the Plaintiff is a Villain regardant to his Manor in another County, yet this shall be tried in the County where the Writ is brought; and this is *in favorem Libertatis*.

The Jury shall first be made to come, and their Names returned upon the *Venire facias* to the Sheriff; and if they do not appear at the Day, then a *Habeas Corpora* shall issue, and afterwards a *Distingas*, which is a Process to distrain them by their Goods and the Issues of their Land to come, which they shall lose if they do not come.

And with these Issues in this Case and in every other Case where Issues are forfeited, the Land shall be charged, into whatsoever Hands it comes afterwards.

^p 7 H. 4. 11. Co. Litt. 157. b. ^q 21 Ed. 4. 67. b. 14 H. 7. 2.
^r 49 Ed. 3. 1. b. ^s 14 H. 7. 2. ^t 11 H. 4. 26. b. ^v 20
 H. 7. 2. b. ^w 18 Ed. 4. 13. ^x 49 Ass. pl. 1. ^y 49
 Ed. 3. 19. b. ^z 21 H. 6. 3. ^b Littlet. §. 193. 19 H. 6. 18.
 That this is by the Common Law. 40 Ed. 3. 36.

As if Issues ^c are returned upon Tenant in Tail, Tenant for Life, or a Man seized in Right of his Wife, the Land shall be charged after their Death; or if an ^d Abbot lose his Issues, and afterwards is translated and made a Bishop, the Successor during his Life shall be charged; and in this Respect, viz. because the Land is charged, the ^e Beasts of any Stranger which come upon the Land may be distrained for Issues lost. And this shall issue perpetually until they appear. And therefore it is called *Distress infinite*.

The Form of the *Venire Facias* is, *We command you, that you cause to come before the Justices, &c. twelve, as well Knights, as other free and lawful Men of the Neighbourhood of N. by whom the Truth of the Fact may be the better known, and who, neither to A. or S. are in any wise related, to recognize by their Oath if, &c. as the same A. says, or not as the aforesaid J. says, because as well the aforesaid J. as the aforesaid A. between whom therein the Dispute is, have put themselves upon that Jury: And have there the Names of that Jury. &c.*

The Form of the *Habeas Corpora* is, *We command you, &c. that you have, &c. the Bodies of G. C. and D. &c. Jurors summoned in Court, &c. between, &c. of a Plea, &c. to make that Jury. And have, &c.*

The Form of the *Distingas* is, *Distrain D. C. and B. &c. Jurors summoned in our Court, &c. between, &c. of a Plea, &c. of all their Lands, &c. on the Octave of St. Hillary, to make that Jury, and to bear their Judgment for many Defaults. And have, &c.*

A ^f Peer of the Realm may have a Writ, called a Writ *de non ponendo in Juratis*, to discharge him from being returned upon a Jury, except his Presence there be necessary for some especial Cause. And this Writ

^c Doc. & Stud. lib. 1. cap. 22. 1 Lord Raym. 308. Bro. Issues, 23. Note the Book Case. 47 Ed. 3. 8. is not Law. ^d 22 H. 6. 4. ^e 5 H 7. 1. Bro. Distress, 41. Gouldsb. 140. pl. 50. per Popham. ^f F. N. B. 165. d. Regist. Orig. 179. b. Dr. & Stud. 1 i. c. 7. 48 Ed. 3. 30. Bro. Exempt. 3. 48 Aff 6. 27 H. 8. 22. Co. Litt. 156. b. 6 Co. 53. a. 9 Co. 49. a. Moor, 767. 2 Rol. Abr. 646. Dyer, 414. pl. 98. W. Jones, 153. Jenk. Cent. 107.

[60] may be directed, either to the Sheriff that he shall not empannel him on any Jury, or to the Judges to discharge him; but if a Peer of the Realm be returned on a Jury, he shall be sworn, or otherwise shall forfeit Issues upon Non-Appearance, except he has this Writ.

^a Where a Peer of the Realm is Party to an Action, a Knight shall be returned on the Jury.

PREROGATIVE.

The King may challenge a Juror without shewing Cause, (by the Common Law, as appears by the Stat. Westm. 2. cap. 32. Co. Litt. 156. b.) or the Array, because the Sheriff, who makes it, is Cousin to the Party, or the like; 4 H. 7. 3. Co. Litt. 156. a. But no such Challenge shall be against the King. 4 H. 7. 3. 19 Aff. pl. 6. Vid. Co. Litt. 150. a.

STATUTES.

33 Ed. 1. De Inquisitionibus. He that challenges for the King, shall shew Cause. Co. Litt. 156. b. 2 Inst. 431. St Pl. Cor. 162. 1 Vent. 309. T. Raym. 473. Trials per Pais. 151. In challenge against him Cause shall be shewn presently. 38 Aff. pl. 22. Bro. Chal. 141. 1 H. 5. 10. Co. Litt. 158. a. Trials per Pais. 178. 2 H. H. P. C. 274.

aforesaid, Cousin of the aforesaid B. that is to say, the Son of C. Sister to D. the Mother of the aforesaid B. And the same B. being thereof asked says, that he cannot deny, but the aforesaid J. is Cousin of the said B. in form aforesaid; therefore it is considered that the Panel be quashed, and holden for none, &c. and it is commanded to the now Sheriff, that he cause to come here on the Octave of St. Hilary, 12, &c. to recognize in form aforesaid.

Upon ^c good Cause of Exception to the Sheriff, and

^a The Law is altered herein, by Stat. 24 Geo. 2. cap. 18. ^b 27 H. 8. 26. b. ^c Co. Litt. 156. a. ^d 14 H. 7. 31. 4 H. 7. 3. b.

after-

afterwards to the Coroners, the ^a Court shall chuse some to return the Jury, name *Essejors*. And then ^e the Parties shall never afterwards challenge the Array.

Challenge to the Polls, is when some of the Jurors are not meet to pass upon the Trial.

This Challenge ought to be taken before the Pannel is perused^f; for if the Plaintiff challenge a Juror, and when the Pannel is perused, the Defendant challenges the same Juror also, yet the Plaintiff may release the Challenge, and then the Juror shall not be drawn, for the Challenge of the Defendant is of no avail, because it was not made until the Pannel was perused; and this Challenge ^g shall be tried by two Jurors chosen by the Court, against whom ^h no Challenge, as to this Purpose, shall be admitted; but such Challenges as do not touch the Dishonour or Discredit of the Juror, as that he is ⁱ of Council with the Party, or within ^k his Distress, or hath ^l not sufficient Freehold, &c. shall ^m be examined by his own Oath; which is called an Examination upon a *Voier dire*. [b]

^a He that challenges the Array, if it pass against him, or (which is Tantamount) if he ^b Release it, shall not challenge the Polls without shewing Cause, which shall be tried presently, viz. before that the Clerk peruses the Pannel; but so it shall not be done in other Challenges.

And after ^c a Challenge to a Juror for one Cause, as Favour, or the like, which is tried against him,

^a 8 H. 6. 12. 2 Rol. Abr. 670. L. pl. 1. Fortescue, c. de Laud. cap. 25. Trials per Pais, 42. Co. Litt. 158. a. ^e 15 Ed. 4. 8. Trials per Pais, 39. ^f 27 H. 8. 26. b. ^g 27 H. 8. 26. b. Co. Litt. 158. a. Trials per Pais, 173. 2 H. H. P. C. 274, 275. ^h Trials per Pais, 174. ⁱ 49 Ed. 3. 1. b. ^k 3 H. 6. 39. ^l 19 H. 6. 9. ^m 2 Rol. Abr. 665, 666. Co. Litt. 158. b. Trials per Pais, 165. ⁿ 7 H. 4. 46. 33 H. 6. 21. Co. Litt. 158. a. Trials per Pais, 174. Moor, 846. pl. 1145. 1 Bullstr. 113. 2 Rol. Abr. 659. 27 H. 8. 26. 20 Ass. 15. 19 Ass. 6. 43 Ed. 3. Fitz Challenge 93. 22 Ed. 4. Fitz. Challenge, 61. Dyer, 201. pl. 66. ^b 27 H. 8. 26. 2 Rol. Abr. 659. Kelwey 41. b. 42. a. contra. Trials per Pais, 164. Acc. ^c 9 Ed. 4. 17. b. Trials per Pais, 174.

he shall not challenge him for another, as for *riens* within the Hundred, or the like.

When any fail, so that the Jury is not full, (as where ^d the greater Part is returned dead, or does not appear, but if ^e all the Polls are challenged and drawn, there no *Tales* shall be had, but a new *Venire Facias*, for *Tales* ^f refers to (*Quales*) some such Thing) then others of the same Condition shall be taken (for there may be many *Tales* one after another) until ^g it be full; and this is called a *Tales*. And this *Tales* ought to be an even ^h Number, lesser ⁱ than the principal Pannel is, as *decem Tales*, *octo Tales*, &c. or in Attaint, where the Jury is twenty-four, a *viginti Tales*. And every *Tales* ought to be of a lesser ^l Number then the other, as after an *octo Tales* shall issue a *sex Tales*, but not a *decem Tales*, nor an *octo Tales* again.

The Entry, where the Jury remains for Default of Jurors, by reason of Challenge, or the like; and the Entry of the *Tales* is, *And certain of the Jurors now appearing, viz. A. B. &c. are sworn on the Jury aforesaid; and J. B. the Residue of the Jurors now appearing, for that he is found to be suspected between the Parties aforesaid, therefore he is quite with-drawn from the Pannel aforesaid; wherefore the Jury aforesaid is further put in Respite here, until in eight Days of St. Michael, for Defect of Jurors; therefore let the Sheriff have the Bodies, and put ten such, &c.*

The Form of the Writ of *Tales* is, *We command you, that you distrain, &c.* (in the Distringas above.) *Also we command you, that you put upon that Jury six, (or ten, or eight, or the like, as the Case is) such, as well*

^d 20 Ed. 4. 11. b. St. Pl. Cor. 155. b. 10 Co. 104. Trials per Pais, 732. ^e 10 Co. 104. b. 2 H. H. P. C. 265. Trials per Pais, 72, 73. ^f Ibid. Nota. ^g St. Pl. Cor. 155. b. Dalton's Sher. 328. ^h Bro. Octo Tales, 11. 10 Co. 105. a. Trials per Pais, 74. but by the Act of 35 H. 8. cap. 6. a *Tales de Circumstantibus* may be granted, as well of an odd as of an even Number. ⁱ 37 H. 6. 12. b. St. Pl. Cor. 155. a. 2 Ro. Abr. 672. 10 Co. 104. b. Trials per Pais, 73. ^k 37 H. 6. 12. b. 2 Rol. Abr. 972. ^l 14 H. 7. 2. b. 47 Aff. pl. 10. Bro. Octo Tales, 15. 10 Co. 105. a. 2 Rol. Abr. 672. S. 2 H. H. P. C. 266.

Knights, as other free and lawful Men of the Neighbourhood aforesaid, and them have before the aforesaid Justices &c. to make that Jury, so that a Jury, at that Day, may not remain to be taken for want of Jurors; and have the Names of them, whom you shall put anew, &c.

Statutes.

Vide Westminster 2. cap. 38. *Those who are above seventy Years, being continually sick, infirm at the Time of the Summons, or dwelling out of the County, shall not be put on Juries. None shall be put on Juries within his County, who cannot dispend 20s. yearly, nor out of his County, who cannot dispend 40s. yearly.*

Vide 21 Ed. 1. De ponendis in Juratis. *None shall be empaneled out of his own County, if he hath not Land to the Value of 100s. a Year, nor within his County, if he have not to 40s. a Year.* [61]

Vide Articuli super Chartis, cap. 9. *Sheriffs, &c. shall put in the Jury such as be the next Neighbours, the most sufficient, and the least suspicious.*

Vide 34 Ed. 3. cap. 4. *Accord.*

Stat. of York, 12 Ed. 2. cap. 2. *When a Deed is denied in the King's Court, wherein are Witnesses named, Process shall go against the Witnesses, and if they do not come at the Grand-Distress, the taking of the Inquest shall not be deferred for their Absence.*

9 Ed. 3. cap. 4. *A Deed dated in a Franchise pleaded in Bar, shall be tried in the County where the Action is brought, and although that Witnesses are named in the Deed; and if the Witnesses do not come at the Grand Distress, the Inquest shall be taken by Default.*

28 Ed. 3. cap. 13. *In Inquests between Aliens and Denizens, although the King be Party, the one half shall be of Denizens, and the other half of Foreigners, if there be so many in the Town or Place where the Inquest is to be taken that be not Parties, nor with the Parties in the Quarrels, &c. and if there be not so many Aliens, then as many as shall be found there, that be not Parties, nor with the Parties, &c.*

2 H. 5. cap. 3. Stat. 2. *No Person shall pass in any Inquest upon Trial of the Death of a Man, nor in any Inquest between Party and Party in Plea Real, or in*

Plea Personal, whereof. the Debt or Damages declared amount to forty Marks, if he have not Lands or Tenements of the yearly Value of 40s. above all the Charges for the same, so that he be challenged.

8 H. 6. cap. 29. *The Statute 2 H. 5. shall not extend but only to Inquests to be taken between Denizen and Denizen; and the Statute 28 Ed. 3. cap. 13. shall stand in force, although that the Aliens have not Lands or Tenements to the Value of 40s. a Year.*

[b] 23 H. 8. cap. 13. *Every Citizen, Freeman, or other, who enjoys the Liberties of any City, Borough, or Town Corporate, where he dwelleth, that hath Goods to the Value of 40l. shall be admitted to pass in Trial of Murders and Felonies there, but this shall not extend to Knights, or Esquires dwelling or resorting there.*

Vide 35 H. 8. cap. 6. made Perpetual, 2 & 3 Ed. 6. cap. 32. *In every Case where a Juror upon any Trial in a Court of Record at Westminster, ought to dispend 40s. Freehold, the Venire Facias shall be, every one of whom hath 40s. in Land, Tenement, or Rent by the Year, at the least.*

Upon every Venire Facias, where this Clause shall be omitted, the Sheriff shall not return any Juror who hath not some Freehold out of ancient Demesne in the same County.

Upon every Pannel the Sheriff shall return six Hundredors.

Upon Request of the Plaintiff in the Writ of Habeas Corpora, or Distringas with a Nisi Prius, the Justices may grant a Tales de Circumstantibus.

Vide 27 Eliz. cap. 6. *In every Case where a Juror returned in the King's-Bench, Common-Pleas, Exchequer, or before the Justices of Assize, ought to have 40s. by the Year of Freehold, he shall have now 4l. and the Venire Facias shall be accordingly.*

Upon a Habeas Corpus, or Distringas with a Nisi Prius, the Sheriff, &c. shall return at the first in Issues upon every Juror 10s. and upon the second Writ 20s. and upon the third Writ 30s. and upon every other such Writ, he shall double the Issues put next before.

Upon Trial of any Issue in a personal Action, it is sufficient if two Hundredors appear.

Vide infra the Statutes for the Visne in Trial of Treason or Felony.

Evidence

Evidence to the Jury, is any Thing whatsoever which serves the Party to prove the Issue for him: but that which does not warrant the Issue, is void; as in a Formedon, and the Gift traversed, the Demandant shall not give in Evidence another Donor^m.

Statutes.

7 Jac. 1. cap. 5. ^a *In Action upon the Case, Trespass, Battery, or False Imprisonment, against a Justice of Peace, Mayor, &c. Constable, Tithingman, or Collector of Subsidy, or Fifteenths, for any Thing done by them by Virtue of their Offices, they, and all that by their Commandment, &c. may plead the general Issue not Guilty, and give in Evidence the special Justification.* [62]

7 Jac. 1. cap. 12. ^o *Tradesmen or Handicrafts-Men, their Executors, or Administrators, shall not give their Shop-Book in Evidence, in any Action for Money, for Wares delivered, or Work done above a Year before the Action brought; except that they, their Executors, or Administrators have obtained a Bill or Obligation for the Debt, or have brought an Action within a Year after the Wares delivered, or Work done.*

But this does not extend to Traffick between Merchant and Merchant, or Tradesman and Tradesman.

^a After the Jury is charged, they ought not to eat or drink, except by License of the Justices, until their Verdict be given; and if ^b they do so before they are agreed, this shall avoid their Verdict; if after ^c they are agreed, it is only finable.

^m 14 Ed. 3. per Plowd. 7. ^a Made Perpetuul, 21 Jac. 1. cap. 12. ^o Continued Indefinitely, 3 Car. 1. cap. 4. 16 Car. 1. cap. 4. ^a Dr. & Stud. lib. 2. cap. 52. Trials per Pais. 216.

Anciently the Law was so held, notwithstanding they eat not at the Charges of either Party (which is here intended) as appears 24 Ed. 3. 24. a. But at this Day the Law seems settled, according to the better Opinions, that it is only a Misdemeanor finable in them that do it, but avoids not the Verdict. 14 H. 7. 29. b. 20 H. 7. 3. a. 2 Rol. Abr. 713 G. pl. 2. 2 H. H. P. C. 306. Jenk. Cent. 187. Rast. Entr. 268. a. 1. And. 183. 4. Co. Litt. 227. b. unless you take it, that they eat or drink at the Cost of either Party, and then it avoids the Verdict, if given for him at whose Cost they eat or drank, otherwise it is good. 14 H. 7. 30. a. b. 2 H. H. P. C. 306. 2 Rol. Abr. 713. pl. 3. Jenk. Cent. 187. 1 And. 184. Co. Litt. 227. b. ^c And this, altho' they eat or drink at the Charge of him for whom they pass. Co. Litt. 227. b. 2 Rol. Abr. 714. pl. 5. 1 Vent. 125. O 2 For

For the better Direction of the Jury in their Verdict, greater Liberty is permitted in pleading of a Matter which is dubious in Law, for the special Matter may be pleaded with the general Issue, as ^d that the Obligation in Suit was sealed by him, and delivered to A. to keep until certain Indentures were made between the Plaintiff and him, and before those Indentures were made, the Plaintiff took the Obligation out of the Possession of A. so not his Deed, is a good Plea, and yet by this general Conclusion, the Matter precedent shall not be waived; for it should be dangerous to put the special Matter in the Mouth of Lay-Men. To the same purpose, Traverse may be omitted, &c. as in ^e Debt against an Executor, it is a good Plea to say, *that Administration was committed to him, so that he ought to be named Administrator and not Executor*, without traversing that he is Executor; for Laymen know no Difference between him who administers as Executor, and him that administers as Administrator.

The Count may be abridged before Verdict, so that the original Writ remains true; as in ^f Affize of his Freehold, and makes his Complaint of Land and Rent, he may abridge it for the Rent; in Affize of his Freehold in D. and demands two Manors in D. he may abridge his Complaint as to the one. But ^g if the Affize be of his Freehold in D. and S. and he demands one Manor which extends to both, he may not abridge any of them, for then the Writ does not remain true. In a ^h Writ of Waste, and assigns the Waste (amongst other Things) in digging up of Copper fixed to the Soil, he may abridge the Waste assigned in this, so that he doth not thereby falsify his Writ. But if the [b] Writ be, wherefore he committed Waste in Houses, Woods, and Gardens, he may not abridge the Waste supposed in the Houses. In a ⁱ Writ of Ward *de Custodia terræ et hæredis*, and Count of the Manor of D. and of fifteen Acres of Land, which are indeed Parcel of the Manor, which is pleaded by the Defendant in

^d 9 H. 6. 38.^e 14 H. 6. 4.^f 9 Ed. 4. 33.^h Dyer 272. pl. 33.^g 14 Aff. pl. 9.ⁱ 39 Ed. 3. 10.

Abatement

Abatement of the Writ, he may abridge his Demand of the fifteen Acres. In Trespass for taking Goods and Chattles, and Count of Money taken (in which Case the Form will not serve, but the Money ought to be expressed in the Writ) he may abridge the Count as to that.

The Entry is, *And it is to be known, that the aforesaid J. and M. in the Court of the King here, made their Demand in the Writ (of Dower) of the third Part of an hundred and fifty Acres of Wood, and of twelve Acres of Pasture with the Appurtenances: And now they abridge that Demand, as to the said third Part, of fifty Acres of Wood, and four Acres of Pasture with the Appurtenances, &c.*

Statutes.

21 H. 8. cap. 3. *The Plaintiff in Assize may abridge his Plaint of any Part to which a Bar is pleaded, in the same manner as he may if the Pleas in Bar had been made, and divided to any certainty, or Number of Acres in the Plaint.*

Note, that sometimes Matters in Pais shall be tried in other manner, and this diversly, according to the Diversity of the Matter in Issue, that is to say, by Proofs, by Certificate, by Inspection, by Battle, or Wager of Law; of all which shall be spoken in their several Places.

An Issue upon Matter of Law (which is called a Demurrer) is when, ^c admitting the Matter of Fact to be true, each of them demurrs upon the Judgment of the Court. The Form of Joinder in Demurrer is, *And the aforesaid (Plaintiff) says, that the Plea of the (Defendant) aforesaid, is not sufficient in Law to preclude him (the Plaintiff) from his Action aforesaid, &c. and that he hath no Necessity, nor is by the Law of the Land bound to answer to that Plea, in manner and form pleaded; wherefore for want of a sufficient Answer, he prays Judgment, &c. And the aforesaid (Defendant) seeing that he hath above alledged sufficient Matter in Law, to preclude the aforesaid (Plaintiff) from having his Ac-*

^c Doc. Pla. 116. Plowd. 13, 50, 85, 172, 411. Co. Litt. 72.

a. 5 Co. 69. b. Carter, 225. 1 Freem. 30, 531. 1 Sid. 10.

^d Vide Plowd. 22, 23. Now by Statute the Causes of Demurrer, are specially set down, 27 Eliz. cap. 5. 4 & 5 Ann. cap. 16.

tion aforesaid against him, which he is ready to certify, and which said Matter, the aforesaid (Plaintiff) doth not deny, nor to the same in any wise answer, but refuses to admit that Verification, he prays Judgment, and that the aforesaid (Plaintiff) from having his Action aforesaid, against him be precluded.

* And the Trial of this is by the Judges.

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This being joined upon an Exception to the Count or Writ, for some Fault which appears in it, puts the Defendant only to make a better Answer (which we call a Respondeas ouster) if it pass against him^f. The Form is, *It seemeth to the Justices, that the Writ aforesaid, be adjudged good, &c. notwithstanding the Plea in Abatement; and that the aforesaid (Defendant) do answer the aforesaid (Plaintiff) to his Declaration and Writ aforesaid; and thereupon the same (Plaintiff) as before defends the force, &c. and says, &c.*

Statutes.

27 Eliz. cap. 5. Upon Demurrer joined in any Court of Record, Judgment shall be given as the Right of the Cause and Matter in Law appears, without regard to any Imperfection, Defect, or want of Form in any Writ, Return, Plaint, Declaration, or other Pleading, Process, or Course of Proceeding, except such as the Party who demurs shall specially express with his Demurrer. And all other Defects in form, the Court may amend*.

Such are the Count and Pleading. The † Process is by Writ issuing out of Record in the Court where the Original is returned, to prosecute the Action until Judgment, bearing *Teste the Chief Justice*, whether it be an *Alias* or *Pluries*, where the Original is returned *Tarde*. And this shall issue out of the the same Court, where the Original is returned, *Teste the Chief Justice*, for by the Return the Court is possessed; but if no Return be made the *Alias* or *Pluries* shall issue out of the Chancery, *Teste the King*. And this Judicial Process shall be sealed with a Seal-Judicial, being in the Custody of the Chief Justice of the same Court, or there is a Mesne Process for some necessary Act to be

* Ante. 16. a. Plowd. 231.
the 4 & 5 Anne, cap. 16.

^f 50 Ed. 3. 20.

† 8 Co. 157. b. Ante. 53. a.
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there done, not only for the Plaintiff against the Defendant, but also for any of them against any other, whose Presence in the Court may be necessary for them, as Vouchee, Praee in Aid, Jurors, Witnesses, &c. or any other Thing which is necessary for the Trial of any of their Allegations. Also to execute their Judgments, and the like.

Such are the Parts of the Action; whereunto generally appertains Appearance and Continuance.

Appearance is for the Party to come into Court, when any one is commanded by the King's Writ to appear; and this ^s at the Common Law was always taken, that he should appear in his proper Person, and could not appear by Attorney; but after he had once appeared, the King's Courts, that is to say, the Chancery, King's Bench, Common-Pleas, and all the other Judges who held Plea by Writ, might admit him by Attorney. Otherwise, when Plea was held without Writ, except the King gave Power, by a Writ of *De-*
[b]
dimus potestatem de Attornato Faciendo.

Prerogative.

The King may License ^b any of the Parties, Plaintiff or Defendant, Tenant or Demandant, to make Attorney in any Action or Suit whatsoever. This Writ ought to be directed to the Judges themselves; and it arises upon the Prerogative of the King, for at the Common Law, the Parties should appear in proper Person, not by Attorney, although the Statutes afterwards gave Power to make Attornies in divers Cases: but before those Statutes, the King might grant Power to a Man, to make an Attorney in any Suit; and one Reason thereof was, because it is not any Error, if the Judges do admit any Plaintiff or Defendant to make Attorney, where by Law he ought not.

Statutes.

Westminster 2. cap. 10. *A Man may make a general Attorney for him in all Counties, where the Justices make their Circuit.*

^s Britton, c. 126. fo. 287. 8 Co. 58. b. 10 Co. 101. a. b. Co. Litt. 128. a. 2 Inst. 249. Mirrour, cap. 2. §. 21. F. N. B. 25. c. ^l ^b F. N. B. 25. c. 2 Inst. 378.

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7 Rich. 2. cap. 14. *He who departs the Realm with the License of the King, the Chancellor may grant to such to make general Attornies in the Chancery by Patent of the King, to answer for him in all Suits.*

15 Ed. 2. Statute of Carlisle. *Admission by Barons of the Exchequer, or the Justices, of any Attorney but in Pleas before themselves, in the Places where they are assigned, shall be void.*

7 H. 4. cap. 13. *The Justices of the one Bench, and of the other, and the Chief Baron of the Exchequer, may examine him, who sues to reverse Outlawry, of his Impotency by reason of any Malady to come in Person in the King's Bench, and thereupon at their Discretion, to Record his Attorney.*

Westminster 2. cap. 15. *An Infant shall sue by Prochein Amy.*

¹ Upon a Day given by Process, which is alway the common Day, and not a special Day, as *Monday, Wednesday, &c.* the *quarto die Post* is allowed, and so are all the Entries, *Obtulit se quarto die Post*^k.

If the Defendant does not appear when he ought, he is said to make Default.

Where the Party, if he does not appear, ought to have some greater Loss, or corporal Pain, (as to have a Charter of Pardon allowed, where one before was outlawed at his Suit¹; at the *sequatur sub suo periculo*, for there if he do not appear, the Land shall be^m forfeited; in *Replevin sicut Pluries*, where a *Capias in Withernam* shall issue against him, &c.) he may appear, although the Return of the Officer do not compel him, as if in the two first Cases he return, *Nihil*, or in the last Case, that the Oxen are esloigned.

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Prerogative.

The King^a by a Writ called *Warrantia Diei*, rehearsing that one, who ought to appear in proper Person, whether Plaintiff or Defendant, is in his Service, may command that for one or two Days, no Default

¹ 12 H. 4. 24. ¹ H. 6. 4. Co. Litt. 134. b. 135. ^k F. N. B. 25. c. ² Inst. 249. ¹ 48 Ed. 3. 1. ^m 7 Ed. 4. 15. ^a F. N. B. 17. a. Co. Litt. 259. b.

shall

shall be recorded upon him; so that if the Tenant in a *Præcipe quod reddat* makes Default at the Grand Cape or Petit Cape, yet before Judgment upon this Default, the King by his Writ may cause, that it shall not prejudice him. And this stands with Reason, for that every Man is bound to serve the King in his Business, and it is not material, whether he be in the Service of the King or not, when the King certifies that he is, for it appears by the Words of the Writ, that the King by his Prerogative may for a Day warrant his Default. And this Writ may not be granted, but by the King himself.

The Form is, *The King to his Justices of the Bench, Greeting. Know ye, that A. was in our Service by our command on Monday, &c. (or^b on Monday in, &c. and on Thursday in, &c.) so that on that Day, (or those Days) he could not be present at the Plea, which &c. And therefore we command you, that the aforesaid A. be not put in Default for his Absence on that Day (or on those Days) nor lose in any Thing, because as to this Matter we will warrant to him that Day (or those Days) Witness, &c.*

If the Plaintiff will not appear when he is demanded at the Day, (which is called a *Nonsuit*) or saith in Court, that he will not sue any further, (which is called a *Retraxit*, and is always of Record) this in all Actions is peremptory, that is to say, by this he shall lose his Action^c.

The Entry of a *Nonsuit* is, *The aforesaid J. G. being solemnly demanded doth not come, nor doth prosecute his Writ aforesaid; therefore it is considered that he and his Pledges of prosecuting in Mercy, &c. and the aforesaid Defendant go thereof without Day.*

The Entry of a *Retraxit* is, *And thereupon the same Plaintiff says, that he will not further prosecute his Plea aforesaid, but from the same hath altogether withdrawn himself, &c.*

^b Note, when it is to save two Defaults,

^c 8 H. 6.

18. 3 H. 6. 13, 14. 3 H. 6. 50.

Statutes.

2 H. 4. cap. 7. *If the Verdict pass against the Plaintiff, he shall not afterwards be Nonsuited.*

[b] Any of the Parties may for once (for ^a a common Essoign lies not after another, without a Mesne Degree) be excused of their Appearance by an Essoign, (which doth ^c not lie for him who appears in proper Person (for an Essoign is to excuse his Absence, to which his Presence is contrary) nor ^a for him who comes in by Exigent or *Cepi Corpus* (for he abides in Custody, or by Mainprize, and therefore may not make Default) if so ^b be, they cast the Essoign, that is to say, demand it the first Day, or any of the four Days, except the other casts an Exception, that is, enters an Exception, that no Essoign be received.

^c At the fourth Day the Essoign ought either to be allowed, (and then it is said to be adjudged and adjourned) or disallowed.

After the Essoign he may not be essoigned the next Day over again, for that is a Fourcher by Essoign ^a. But upon every Mesne Appearance, he may over again be essoigned; for if the Plaintiff and Defendant will, they may fourch by Essoign infinitely by the Common Law ^b. As upon Wager of Law in Debt, and at the Day to ^c make his Law, the Plaintiff is essoigned, and at the Day given over by the Essoign, the Defendant is essoigned; now at the Day given over by this Essoign, the Plaintiff may over again be essoigned.

And this is called an Essoign *de Molo Veniendi*, or the common Essoign ^a.

The Form is, *At which Day comes the aforesaid J. H. &c. and the aforesaid C. caused himself to be essoigned, for falling sick in coming, against the aforesaid J. H. of the Plea aforesaid; and he had thereof Day by his Essoign here until this Day, viz. &c.*

^a 9 H. 5. 53. ^c 35 H. 6. 33. Carth. 172. ^a 2 Inst. 417. ^b 18 Ed. 4. 4. ^c Ibid. Bro. Essoign, 112. 1 Rol. Abr. 823. pl. 11. ^d 39 H. 6. 29. 21 Ed. 4. 16, 78. 11 H. 6. 31. 1 Rol. Abr. 823. ^e 27 H. 6. 2. ^f Selden's Notes on Fortescue, fo. 56. on Hingham, 28. ^g 2 Inst. 125.

Statutes.

Statutes.

Westminster 2. cap. 12. *It lieth not for the Appellor in Appeal of the Death of a Man.*

Westminster 1. cap. 41. *In Affize, Attaint, and Juris Utrum, the Tenant shall not be essoigned after that he hath once appeared, but he shall make his Attorney.*

Westminster 2. cap. 28. *So it shall be in Affize for the Demandant.*

12 Ed. 2. Stat. de Essoniis calumniandis. *See many special Cases, where Essoign doth not lie.*

Westminster 1. cap. 42. *Parceners or Jointenants shall not fourch by Essoign from the Time that they have once appeared in Court; but shall have only one Essoign.*

Gloucester, cap. 10. *Same Law of Husband and Wife impleaded in the King's Court.*

9 Ed. 3. cap. 3. Stat. 1. *In Debt against Executors, they shall have but one Essoign before Appearance, and another after Appearance.*

Marlbridge, cap. 13. *After a Man hath put himself upon an Inquest, he shall have but one Essoign.*

Westminster 2. cap. 27. *Accord: Nor after Day [65] given by the Prayer of the Parties, where the Parties consent to come without Essoign.*

Marlbridge, cap. 19. *None shall swear for the Warranty of his Essoign in the County, Hundred, Court Baron, or other Court.*

^a Besides these, Essoigns for special Cause, as *de Malo Lecti*, and *de Moratur Ultra Mare*, are allowable; and have Adjournment for a Year and a Day.

^b In these, there ought to be an Oath, that the Cause is true.

Statutes.

Westminster 2. cap. 17. *Where before the Justices in their Circuit, an Essoign is cast de Malo Lecti for Land in the same County, this shall not be allowed, unless he be sick indeed, but that the Party shall take Averment against it, which if it be found, the same shall turn to a Default.*

^a 2 Inst. 125, 137. 27 H. 6. 1.

^b 2 Ed. 4. 16. 2 Inst.

THE THIRD BOOK

This Essoign shall not lie in a Writ of Right between two claiming by the same Descent.

Westminster 1. cap. 43. *Against an Essoign de Ultra Mare, Averment shall be taken, that the Defendant was within the four Seas at the Day of the Summons, and three Weeks after; which if it be found, this shall turn to a Default. This is intended only before the Justices of the King.*

Prerogative.

The Essoign de Moratur Ultra Mare, in the Service of the Lord the King, is a special Essoign, and is in all Points as the Essoign de Malo Ledi; that is to say, it hath Adjournment for a Year and a Day, Oath shall be taken that the Cause is true, &c^c.

The Form in the Essoign of the King's Service is, *Afterwards at &c. comes the within named H. by &c. and the within named E. being demanded did not come, but caused himself to be essoigned against the aforesaid H. &c. of the Plea within written, because he is in the Service of the King, by J. G. whereupon the same J. being asked by the Justices, &c. if he will swear this, as the Custom is, &c. or no, saith that he will not, but hath refused to swear. Therefore it is considered, that the Essoign aforesaid be quashed, and wholly holden for none, and that the Jury aforesaid be taken against the aforesaid E. by Default, &c.*

Statutes.

5 Ed. 3. cap. 7. *It shall not be allowed in Writs of Attaint.*

[b] *Note, That all which concerns Essoigns is entered in a Roll by itself, which is called the Essoign Roll, that is to say, not in the Record, or Plea Roll^a.*

Prerogative.

The King, in respect that the Defendant is in his Service, may take him into his Protection, (for ^a a Protection never lies for the Plaintiff, except in special Cases, where he comes to be Defendant; so ^b that for

^c 27 H. 6. 1. 2 Ed. 4. 16. 2 Inst. 137. 314.

157. b.

^a F. N. B. 28. g. Co. Litt. 130. b.

H. 6. 38.

^d 8 Co.

^b 39

a Year he shall be quit of every Suit, except certain which are mentioned in the Protection; and all Defaults during that time shall be saved. So that ^c upon a Protection (cast in a Personal Plea at *Nisi Prius*, and repealed at the Day in the *Bank*) yet the Inquest shall not be taken by Default, for the Default was once saved; otherwise it is of a Protection disallowed at the Day in *Bank*; and a Man^d may excuse his Default at the *Grand Cape*, or *Petit Cape*, by casting a Protection; but a Protection^e may only be for a Year, for otherwise it may be for twenty or a hundred Years, and by the same Reason for a thousand Years, which should be a great Inconvenience, and a Disherison of the Party, which a Protection for a Year is not, for after the Year, he may have a Resummons, and proceed in his Suit; yet the King, after the first Year, may take him into his Protection again for another Year, although it be done by the Space of ten or twenty Years together; for in this Case, no Mischief or Inconvenience appears at the first, as where he takes him into his Protection for so many Years together.

Statute.

7 H. 4. cap. 4. *A Protection shall not be allowed in an Action against a Goaler, that suffers a Prisoner in Execution for Debt to go at large by Mainprize, or in bail.*

^f This Protection is double.

Protection *quia Profecturus*, when he is to go over Sea upon the Business of the King.

Protection *quia Moratur*, when he tarries there for such a Cause. Of which Nature also is a Protection^g *quia in Prisons*, when being sent beyond Sea in the King's Wars, he is there taken and detained in Prison. If he goes and tarries in the Business of the King in the ^h Marches of Scotland, or the like, this was accounted as beyond the Sea. But a Protectionⁱ *quia Moratur super altum Mare*, is not good, for it may not be intended that he tarries there.

^c 21 H. 6. 20. b. Co. Litt. 130. b.

^d F. N. B. 29. c.

^e 39 H. 6. 38. b. Ante. 10. a. Co. Litt. 254. b. 130. b.

^f 39 H. 6. 38. b. ^g F. N. B. 28. c. Co. Litt. 131. b.

^h F. N. B. 28. h. ⁱ 39 H. 6. 39. F. N. B. 28. i. Co. Litt. 130. b.

The Form of a Protection is, *The King, &c. to all, &c. Know ye, that we have taken into our Protection and Defence, J. S. who, &c. (and so shewing the Cause, either because he carries in the Business of the King, &c. or because he is about to go, &c.) his Men, Lands, Things, Rents, and all the Possessions of him the said J. S. And therefore we command you, that you protect, &c. him the said J. S. his Men, &c. In Testimony whereof, these our Letters, &c. to continue for one Year. Also we are willing, that the same J. S. be in the mean time quit of all Pleas and Complaints, except Pleas of Dower unde nihil habet, and Quare Impedit, and Assize of novel Disseizin, and Darrien Presentation, and Attaint, and except Complaints,* [66] *which may happen to be summoned before our Justices in Eyre in their Circuits; these Presents not to avail after the coming of the said J. S. into England from our Business, &c.*

Statutes.

13 R. 2. cap. 16. No ^k Protection with Clause *Profecturus* shall be allowed, if the Suit commences before the Date of the Protection, except he goes with the King, or in his Business. And although it be allowed, if he does not go in convenient Time, or if he comes back from the Service, the Chancellor, upon Information, may repeal it.

33 Ed. 1. Stat. De Protect. Averment may be against a Protection of the King's Service.

1 R. 2. cap. 8. No Protection with the Clause (*Volumus*) shall be allowed for Victuals taken or bought upon the Voyage or Service, whereof the Protection makes mention, nor in Pleas of Trespass, or other Contract, made after the Date of the Protection.

Continuance, is from Day to Day, until the end of the Suit.

Otherwise, that is to say, if the Plaintiff does nothing, all is discontinued *.

If there be any Error in the Continuance, as by awarding a *Capias* where a Distress lies, or the like, it is called a Miscontinuance ¹. Such Continuances are most commonly by, "Same Day is given to the Plain-

^k Co. Litt. 131. a. * 24 Ed. 3. 48. 11 H. 7. 5. ¹ 21 H. 7. 16. b. 40 Ed. 3. 15.

tiff, or Defendant, or the like." Sometimes by, "*The Court will advise.*" "*The Juries are put in Respite for want of Jurors.*" "*The Sheriff hath not sent the Writ,*" or the like.

Statutes.

21 H. 3. De Anno Bissextili. *The Day increasing in the Leap Year, shall be reckoned of the same Month in which it arises, and this, and the Day before shall be accounted for one Day.*

51 H. 3. Communes in Banco. *Day shall be given in Writs until nine Returns, that is to say, if it come in eight Days of St. Michael, Day shall be given until eight Days of St. Hillary, &c.*

51 H. 3. Dies communes in Dote. *Common Day in real Actions, shall be nine Returns. In Writs of Dower five Returns.*

Vide 32 H. 8. cap. 1. *Accord.*

Marlbridge, cap. 12. *In Dower unde nihil habet, four or six Days shall be given in one Year. In Assize of Darrien Presentment, and Quare Impedit shall be given from fifteen Days to fifteen Days, or from three Weeks to three Weeks, as the Place is near or more remote.*

Vide 5 Ed. 3. cap. 6 & 7. *In Attaint five Days shall be given at least.*

In all Cases that happen ^a without any Default in the Plaintiff, as by *Demise* of the King, (so his Death is called, because in Law he never dies, but demises his Crown to another) *Non Venue* of the Justices, *ceasing of Oyer, Protection, &c.* the Parol shall be put without Day. The Entry is, *At which Day the Plaint aforesaid remained without Day, because the Lady Elizabeth, late Queen of England died.* And there Resummons ^b, or Re-attachment, (according as Summons, or Attachment lay in the Action before) shall be had to revive the Suit. Such ^c Re-summons or Re-Attachments, are in two manners, the one General, the other Special. General, as where the King directs his Writ to the King's Bench, or the like, that at the Suit of

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^a 24 Ed. 3. 48. Bro. Resum. 33. 5 H. 7. 40. 2 Inst. 441.

^b Co. Litt. 135. b.

^c 7 Co. 29. b.

all his Liege Subjects, who will prosecute, they shall award Re-summons, Re-attachments, &c.

The Form is, *We command you, that at our Suit, and at the Suits of all our Liege People, who will prosecute, besides and above all, or any Records, Pleas, Writs, Precepts, Proseses, Bills, Plaints, Appeals, Fines, and other memorable Things whatsoever, in our Court before us now being, or that for the future may come before us, ye do adjudge according to your Discretions, changing those Things that are to be changed, as the Case requires, all Writs of Re-summons, Re-attachments, and all other Proseses, for us, and our said Liege-People, in this behalf to be had, according to the good Intentions, and Purposes under-written.*

Special, which is awarded against a Man in certain, to hear the Record and his Judgment of the Suit, which was, &c. so that it may be in the same State as it was.

The Form is, *The King to the Sheriff, Greeting. Re-summon by good Summoners, A. B. that he be before us on the Morrow, &c. wheresoever we shall then be in England, to hear the Record, and the Judgment of a Plaint, which was in the Court of the Lord Henry late King, &c. so that that Plaint may then be in the same State as it was in the late Court of the aforesaid late King in eight Days, &c. last past, on which Day the Plaint aforesaid was adjourned, until &c. then next following, before which Day the Plaint aforesaid remained without Day, because the aforesaid late King died.*

^a Upon the general Re-summons, the Original and the Issue (if any be joined) is revived, for it is a full Record, and ought to be entred; but the Process before the Issue joined, nor the Voucher, nor the Garnishment, &c. shall not be revived without a special Writ reciting all the special Proceeding. But no Re-summons or Re-attachment shall be upon a Discontinuance, although it be in a Writ of Ward, where Re-summons is given by the Statute; for upon a Discontinuance, the Original is determined.

^a 7 Co. 29. b.

Statutes.

¹ Ed. 6. cap. 7. *By Demise of the King, no Action between Party and Party in any Court of Record shall be put without Day, but shall stand in the same Condition.*

After Continuance taken, the Defendant may for once wave his former Plea, and plead another Matter which happens after the last Continuance, which is called a Plea *puis Darrien Continuance*: As if the Defen-

PREROGATIVE.

Although a Man hath plead-
ed once after the last Continu-
ance, yet, if the King is to have
Benefit by his Plea, as in plead-
ing Outlawry, or the like, he
may plead another Plea after-
wards. 3 H. 7. 9.

dant^a in Action of Account, pleads Receipt of Parcel by the Plaintiff, who wages his Law, now at the Day that the Plaintiff hath to make his Law, the Defendant may plead a Release after the last Continuance.

^b Continuance is by Process, or in the Roll.

That upon the Roll is, "Day given, or Impar-
lance."

Day given, when the Court gives Day to the Parties^c, and hereupon in a Personal Action, the Defendant shall not be condemned by Default after such Continuance; for it is the Act of the Court, and he hath not demanded Day, as upon an Imparlance. And^d this is always before the Count.

The Entry is, *A. was summoned to answer B. of a Plea, &c. and thereupon Day is given, as well to the aforesaid B. by, &c. as to the aforesaid A. by, &c. here until, &c. in the State wherein now, saving to the Parties, &c.*

Such Continuance by the Assent of both Parties, is called a *Prece Partium*, so^e that if the Defendant comes upon an Exigent by *reddit se*, and be in Main-
prise, yet the Plaintiff may have Day *de Prece Partium*, notwithstanding that thereby the Defendant shall be out of Custody, for it is by the Assent of the Parties.

Imparlance, is when the Defendant or Plaintiff^f demands a Day to see if, in the mean time, the Matter

^a 21 Ed. 3. 49.
6. 39, 41. Bro. Default, 34.
3. 1. Bro. Continuance, 14.
fault, 34.

^b 21 Ed. 4. 16, 78.

^d 18 H. 8. 6.

^f 7 H. 6. 39, 41.

^c 7 H.

^e 41 Ed.

Bro. De-

may be ended without any further Suit; and this he may do once, but not oftner, without the Assent of the other Party. And ^e this is always after the Count.

The Entry is, *And thereupon the same T. and J. S. pray License thereof of emparling here until fifteen Days of Easter, &c. The same Day is given to the aforesaid J. G. here, &c.*

[b] After Imparlance, the Defendant shall not plead to the ^h Jurisdiction of the Court, in Disability of the Person, nor in Abatement of the Count or Writ; for after Imparlance, a ⁱ *Supersedeas* by Priviledge out of the Chancery shall not be allowed; he shall not plead that the Land is within the Cinque Ports, or in Ancient Demesne, &c. or that the Plaintiff is ^a a Villain, or ^b Outlawry in the Plaintiff, in Debt upon a Simple Contract, or in Trespas of Battery, or false Imprisonment (but in Debt upon an Obligation he may, for this is to the Action, inasmuch as the King is to have the Debt) or that the Plaintiff is an ^c Alien, that is, to the Person, in Action of Trespas for the breaking of his House, but to the Action he may; nor Misnomer, as ^d *null tiel Ville* of D. where he is named J. S. of D. but where a *Præcipe quod reddat* is brought of the Manor of D. in D. there he may, for there it is in Bar; and in Action of Debt against an Executor^e, he shall not plead *that he is Administrator, and not Executor*, but that *he was never Executor, nor ever administred as Executor*, he may, for this is to the Action; nor shall he demand Oyer of the Obligation, or the like, ^f but he may plead Variance after, and by that means he shall have View of the Obligation and Condition; and so he shall have Advantage to plead any Matter in Bar.

But after a special Imparlance, saving all Advantages, he may plead to the Count or Writ, and have

^e 18 H. 8. 6. ^h 34 Ed. 3. Fitz. Continuance, 10. Qui capit diem per prece partium dat Judicii Jurisdictionem, partem facit Responsibilem, malum breve Affirmat, malum Processum ratificat. per Wilby. ⁱ 22 H. 6. 7. ^a 4 H. 6. 67. ^b 16 Ed. 4. 4. Kelwey, 93. a. Latch. 179. ^c 32 H. 6. 33. ^d 13 H. 7. 17. b. ^e 32 H. 6. 27. ^f 4 H. 7. 10. b.

Oyer; but in this Case, he shall not plead to the Jurisdiction, nor in Disability of the Person *.

* Default after Imparance, viz. at the Day given by the Imparance, is peremptory, that is to say, loses the Action in all Actions whatever, for it is a Departure in despite of the Count; ^b as in Debt, Trespass, or the like, the Plaintiff in this Case shall recover his Damages; in a *Præcipe* ⁱ *quod reddat*, if the Tenant appear, and imparl, and afterwards makes Default, seizure of the Land shall be awarded, and not a Petit Cape. In a ^k Writ of Right, if the Tenant vouch, and the Vouchee enter into Warranty, and imparls, and afterwards makes Default, the Demandant shall recover Seizin of the Land against the Tenant, and the Tenant over in Value against the Vouchee. The Entry is, *And the aforesaid A. although solemnly called, hath not come, but in Contempt of the Court departed and made Default.*

Thus much hath been said of the Action. That which ⁱ determines the Action, consists of two Parts, Judgment, and Awarding of Execution.

If the ^m Judgment be for the Plaintiff, he shall recover Costs of his Suit.

The Entry of Judgment for the Defendant is, *go thereof without Day*; as well where the Writ abates, as where the Plaintiff is barred. And ⁿ the Judgment shall be applied according to the Matter.

Statutes.

23 H. 8. cap. 15. *The Defendant shall recover Costs in any Action, Bill, or Plaint of Trespass upon the Statute 5 Rich. 2. of Entries into Lands, &c. or in any Action, &c. of Debt or Covenant upon Specialty, or upon*

* 4 H. 6. 67. Bro. Continuance, 6. * Post. 101.
a. ^b 33 H. 6. 33. ⁱ H. 7. 11. ⁱ Bro. Default,
34. 39 H. 6. 16. b. ^k 38 H. 6. 33. ⁱ Dyer, 220. b.
Breve non pendet post Judicium redditum & Dyer, 268. pl. 17.
The Writ of false Judgment shall be Recordare facias Loquelam
quæ fuit in eadem Curia, et non quæ est, for by the Judgment
the Paroll is determined. ^m 9 H. 6. 32. ⁿ 8 Co.
62. b.

[68] any Statute, be it in a Court of Record or not, that is to say, upon Nonsuit, or a Verdict against the Plaintiff; but a Plaintiff who sues in *Forma Pauperis*, shall be punished at the Discretion of the Judge.

24 H. 8. cap. 8. But the Defendant shall not recover Costs against the Plaintiff at the Suit of the King, notwithstanding Nonsuit or Verdict against the Plaintiff.

Vide 8 Eliz. cap. 2. The Defendant in the King's Bench, where he puts in Bail, shall recover Costs, that is to say, if the Declaration be not put in by three Days after the Bail taken, or if the Suit be discontinued, or the Plaintiff be Nonsuited. So in Attachment or Arrest upon any Bill, Plaint, Action, or Suit in a personal Action in any Court. But in this Case, if such Court hath not continuance *de die in diem*, then the Plaintiff ought to put in his Declaration at the next Court, except Day be given to him further by Discretion of the same Court.

4 Ja. 1. cap. 3. The Defendant shall recover Costs against the Plaintiff upon a Nonsuit, or Verdict in Action of Trespass, or *Ejectione Firmæ*, or other Action whatever, wherein the Plaintiff or Demandant ought to recover Costs, if the Judgment should be for him; and this, whether the Action be brought in a Court of Record, or in other Court whatever.

43 Eliz. cap. 6. The Plaintiff in any personal Action, in any Court at Westminster, which is not for Title, nor concerning Interest of Freehold or Inheritance, nor for Battery, shall not have greater Costs than the Debt or Damages recovered amount to, that is to say, where it is signified by the Justices, before whom it is tried, that the Debt, or Damages to be recovered, do not amount to 40s. but he shall recover less at the Discretion of the Justices.

The Award of Execution shall be by Writ, except it be in the Case of Death. And to have the Court to make their Judgment to be executed, a Writ *de Executione Judicii* lies^o, whether the Judgment was in a Court Baron, (that is, in the Court of any Lord, in the Hundred, or County Court, by Writ of Right, or

^o F. N. B. 20.

Justices, or by *Plaint* without Writ) or in a Court of Record; and this Writ shall be directed to the Bailiff, if the Judgment was in the Hundred, or in the Court of any Lord; to the Sheriff, if it was before him in the County Court; to the Justices themselves, if it was in a Court of Record. And the Writ is a *Justices*. The Form is, *The King, &c. We command you, that without delay, you cause Execution to be done, of the Judgment lately given in your County (or the like) of a Plaint which lately was, &c.*

C H A P. II.

[b]

Of Pleas of the Crown.

*Hæc mihi dicta semel totis hærentia sæctis,
Ne rerum seriem scindere cogar, erunt.*

ALL Actions serve either meerly to draw some new Thing in Suit, or to defeat something which hath passed in a Suit before.

The first are *Pleas of the Crown*, or *Common Pleas*.

Pleas of the Crown, which are to punish some Offence: where ^a the King's Bench is the proper Court, and the ^b Marshalsea is their Prison. The ^c Prisoner there shall be impleaded in every personal Action by Bill in this Court, in the Custody of the Marshal, and not elsewhere. But so it is not of ^d a Prisoner in the Fleet.

The Pleas in the King's-Bench are holden before the King himself; and therefore the Form of a Writ returnable there, is ^e *put by Pledges, &c. B. that he be before us, wheresoever we shall then be in England.*

Prerogative.

Pleas of the Crown for the King, are by way of Indictment, or Presentment, for any Offence whatsoever, as Treason, Felony, Maihem, or although it be

^a Plowd. 320. 4 Inst. 71.
Inst. 23. 4 Inst. 71, 72.

^c 2 Inst. 22. 4 Inst. 76.

^b Dyer, 297. a. ^e 2
^d 27 H. 6. 5. 11 Ed. 4. 3.

but Trespass. And therefore Indictment is as the Action of the King^f, without which the King may not take Suit by reason of a Wrong done principally to another; but of a Wrong done to himself, whereof another hath no Action, but the King, he may. And Offences to the Public, shall be punished only at his Suit.

For this Reason the King may pardon them, that is to say, Offences to the Public, wholly, the others, as much of them as belong to him, and the Forfeiture, Fine, &c.

Statutes.

Vide 10 Ed. 3. cap. 3. *He that hath a Pardon for Felony, shall find within three Months, before the Sheriff and Coroner, sufficient Mainpernors of his good Abearing; otherwise it shall be holden void.*

Vide 14 Ed. 3. cap. 15. *A Pardon of Felony granted to a Man, but where the King may do it, saving the*
 [69] *Oath of his Crown, shall be holden for none.*

27 Ed. 3. cap. 2. *In a Pardon of Felony, the Suggestion itself, and the Name of him who makes the Suggestion, shall be comprised in the Charter. And upon a Suggestion found untrue, the Charter shall be disallowed.*

13 R. 2. cap. 1. *No Pardon of Murder, the Death of a Man killed by Await, Assault, or Malice prepense, of Treason, or the Rape of a Woman, shall be allowed, except the same Murder, Death of a Man killed by Await, Assault, or Malice prepense, Treason, or Rape, be specified in the Charter.*

An Indictment, is when a Jury of twelve at least, upon Enquiry for the King, find a Bill, setting forth such an Offence to be true. The Form is, *The Jurors present, that, &c.* or the like. If they do not find a Bill preferred to them to be true, the manner is to endorse upon it *Ignoramus*.

Every strong Suspicion of such an Offence, although it be in the Case of Felony, which appears of Record, hath the Force of an Indictment; as in Action^g of

^f 7 Ed. 3. 334. b. ^g 31 Ed. 3. Fitz. Inditement, 31.
 2 H. H. P. C. 150, 151*. 2 Hawk. Pl. Cor. 211, 212, 213, 214.

Trespass for carrying away of Goods, if the Defendant pleads not Guilty, and is found Guilty; in Appeal^h of Murder, &c. if the Plaintiff after Declaration be Nonsuit; but so hath not the Returnⁱ of the Sheriff, as where he returns, that one hath made an Escape of Felony.

Upon Indictment the Party shall be arraigned, that is, put to answer by the King, and shall be tried by another Jury; which, in Case of Felony, Treason, or the like, where Life is to be lost, we call the Jury of Life and Death.

Between Party and Party^k, the Pleas of the Crown are by way of Appeal in Felony, of what Nature soever it is, or in Maihem; for in Case of Petit Treason Appeal lies, but not of High Treason^l.

The Form is, *The King to the Sheriff, Greeting: If A. the Brother and Heir of B. shall make you secure, &c. then Attach J. S. late of S. in your County, Gent. by his Body according to the Law and Custom of our Realm of England, so that you may have him before us (on such a Day) wheresoever we shall then be in England, to answer to the aforesaid A. of the Death of the aforesaid B. late his Brother, whereof he appeals him. Witness, &c.* So it shall be to answer for a Robbery, and the Peace of the Lord the now King broken, or for a Maihem, and the Peace of the Lord the now King broken, wherefore he appeals him.

Statutes.

Vide 1 H. 4. cap. 14. *No Appeal shall be sued in Parliament.*

In both, that is to say, in Indictments and Appeals, the Original^m Process is a *Capias*, viz. Process to imprison him, and (if he be not taken, nor will render himself) Process of Outlawry, that is, to be out of the

^h 4 Ed. 4. 10. 2 H. H. P. C. 149* 221. ⁱ 2 Ed. 3. 28. b. 2 H. H. P. C. 151*. ^k Plowd. 476. An Appeal, as well as an Indictment against the Accessary, shall be that he received him against the Crown and Dignity of the King. ^l Dyer, 50. a. b. ^m Britton per Stamf. 67. in Appeal of Death. 2 Aff. pl. 81. in Indictment of Death. 18 Ed. 3. 20. That in Appeal of Maihem *Capias* lies the first Day.

[b] Protection of the King and his Heirs ; for at the Common ^a Law, no Process of Outlawry lay, but where the Writ was *Vi et Armis*, as in Trespass, Conspiracy, &c. and the reason why it lay in such Cases is, because they are Acts founded on the sole Wrong of the Defendant.

The Form of the *Capias* is, *We command you, that you take J. S. of, &c. if he be found, &c. and him safely, &c. so that you may have his Body before us (on such a Day) wheresoever we shall then be in England, to answer A. of the Death of C. (or of the Robbery, &c. or of Maihem, &c. as the Case is) whereof he appeals him.*

The Form of Process of Outlawry, viz. the Exigent is, *We command you, that you cause J. S. late of, &c. to be called from County to County, until according to the Law and Custom of our Realm of England he is Outlawed, if he do not appear ; and if he appear, then that you take him, and safely keep him in our Prison, so that you may have his Body before us (on such a Day) wheresoever, &c. to answer, &c. as above.*

In ^b Treason, and the ^c Death of a Man, there shall be but one, (be the Offence Murder or Homicide;) in other ^d Felonies, (as in Burglary, Robbery, and Larceny) two ; in ^e Maihem, three *Capias*'s before the Process of Outlawry.

Statutes.

5 Ed. 3. cap. 13. Stat. -1. *An Outlaw who will reverse the Outlawry, by reason of the Imprisonment testified by the Sherifff, or the like, shall render himself to Prison, and upon a Scire Facias against him, at whose Suit, &c. he shall have Averment, that he was not in Prison at the Time ; so shall the King's Serjeant and his Attorney have, where the Outlawry was at the King's Suit.*

1 H. 5. cap. 5. *In every Original Writ of Actions Personal, Appeals and Indictments, wherein the Exigent*

^a Post. 73. a. ^b Bro. Process, 149. ^c 8 H. 5. 6. b.
20 Ed. 2. Fitz. Corone, 234. 20 Aff. pl. 81. ^d Bro.
Proc. 149. ^e 8 H. 5. 6. b. 20 Ed. 2. ubi supra.

shall

shall be awarded, Additions shall be made of the Estate, Degree, or Mystery, and of the Town, Hamlet, or Place, and County where they dwell; otherwise the Outlawry pronounced shall be void. And the Writ or Indictment may be abated by Exception of the Party. But it shall not abate by Surplusage of Additions, viz. Personals, which vary from the Records or Deeds.

6 H. 6. cap. 1. Before that the Exigent shall issue against any Person upon Indictment of Treason, or Felony, in the King's Bench, a Capias shall issue to the Sheriff of the County where he is named in the Indictment, returnable at least six Months after.

Every Exigent or Outlawry before the Return of such Writ, shall be void. This was to endure so long as it should please the King. [70]

8 H. 6. cap. 10. In every Indictment or Appeal of Treason, or Trespass before Justices of the Peace, or other Commissioners, a second Capias shall issue before Exigent to the Sheriff of the County where by the Indictment he is supposed to dwell. This second Capias shall contain the Space of three Months, where the Counties are holden from Month to Month, of four Months, where they are holden from six Weeks to six Weeks. And by this, it shall be commanded to the Sheriff to take his Body, if, &c. and if he is not to be found within his Bailiwick, then to make Proclamation for his Appearance before the Justices in two County Courts before the Return of the Writ. Every Exigent or Outlawry in other manner shall be void.

10 H. 6. cap. 6. Accord, where such Indictment or Appeal is removed into the King's Bench or elsewhere, by Certiorari, or otherwise.

No Man in Case^a of Treason, nor the ^b Principal in Felony, nor the Accessary after the Attainder of the Principal, nor the ^c Defendant in a heinous Maihem is bailable, that is to say, he shall not be delivered out of Custody, altho' he will find sufficient Sureties to answer to the Action.

^a Westm. 1. cap. 15. ² Inst. 189. ¹¹ Co. 29. a. ^b Stamf. P. C. 71, 72. ^c 6 H. 7. 1. b.

In ^a other Cases they are bailable upon sufficient Surety; which, in respect that he is delivered into the Hands of his Friends, his Sureties, is called Bail; and in respect that they take him into their Hands, it is called Mainprize; and a ^e Writ of Mainprize lies for him to be bailed in such Cases.

The Form of the Writ of Main-prize is, *It is shewed to us on the Behalf of W. (reciting the Cause for which he is in Prison) We command you, that if he is detained in the Prison aforesaid for the same, &c. and on no other Occasion, and will find you sufficient Mainpernors, who will be Mainprize to have him before, &c. to stand to Right touching the said Theft (or the like) according to the Law and Custom of our Realm of England, then in the mean time cause him the said W. to be delivered from the said Prison by the Mainprize aforesaid, &c. and have there the Names of the Mainpernors, &c.*

The Entry of Mainprize is, *A. B. C. D. E. and F. personally here in Court were Mainprize for J. S. of G. Yeoman, to be before the Lord the King (on such a Day) wheresoever he shall then be in England, to answer to G. H. of, &c. whereof he appeals him, viz. each of the Mainpernors aforesaid, under the Penalty of 20 l. (or the like) which said Sum the same Mainpernors have acknowledged, and every of them by himself doth acknowledge, to be made and levied of his Lands and Goods, to the Use of the said Lord the King, if it shall happen that the aforesaid J. S. do not appear personally at the aforesaid (Day.)*

Statutes.

Westminster 1. cap. 15. *Persons outlawed, such as have abjured the Realm, Provers, and such as be taken with the Mainer, Prison-breakers, Thieves openly defamed and known, Appellees by Provers (during the Life of such Provers) if they be not of good Fame, House-burners, Counterfeiters of the King's Seal or Coin, excommunicate Persons, manifest Offenders and Traitors, are not replevable. But Persons indicted of Larceny by Inquests taken before Sheriffs or Bailiffs, or for light Suspicion, or for Petit-Larceny, or arraigned of receiving Thieves or Fe-*

^a Plowd. 67.

^e F. N. B. 249. g.

lons, or of Commandment, or of Force, or Aid of a Felony done, or accused of other Trespafs for which a Man shall not lose Life or Member, and an Appellee by a Prover, after the Death of the Prover, if he be not an open defamed Thief, is repleviabie.

This Statute recites that, at the Common Law, those who were taken for the Death of a Man, or by the Command of the King, or the Justices, or for the Forest, are not repleviabie.

The Accessory in ^a Felony or ^b Maihem (for ^c in Treason there are no Accessories, for all are Principals) shall not be compelled to answer until the Attainder of all the Principals by Verdict, Outlawry, &c. ^d and altho' it be by betaking him to his Clergy, or by Abjuration. So that if the Principal ^e dies, or hath his ^f Pardon, or if ^g two are indicted, the one as Principal, the other as Accessory, and the Principal is afterwards attainted of another Felony, and hanged, the Accessory shall be discharged. And if one of the ^h Principals be not attainted, the Accessory shall not recover Damages against the Abettors, for he is not *legitimo modo acquiescens*.

Statutes.

[71]

Westminster 1. cap. 14. *No Exigent shall issue against the Accessory in Appeals, until the Principal be attainted.*

In Case of Life, upon Indictment or Appeal, ⁱ the Defendant may have many Pleas in Abatement, whether they be Matters of several Natures (that is to say, one triable by Record, another *per Pais*, as that the Appeal was purchased pending another, and also *nul tiel Ville*, Hamlet, or Place known out of the Town or Hamlet, as C, whereof the Defendant is supposed to be) or Matters all of the same Nature, triable by the Country, as that his Name is *William*, where he is named in the Appeal *John*, and also *nul tiel Ville*, &c. ^k or that the Party, who is supposed by the Appeal to

^a 40 Ed. 3. 42. ^b 41 Ed. 3. Fitz. Trespafs, 199. ^c 3
H. 7. 10. Co. Litt. 57. a. b. ^d 2 Inst. 183. ^e 3 Inst. 138. ^f 4
Co. 43. b. ^g 21 H. 7. 31. b. ^h 3 H. 7. 12. b. ⁱ 12 Ed. 2.
Fitz. Corone, 378. ^j Dyer, 120. b. ^k 1 Stamford. Pl. Cor.
82. ^l 4 H. 6. 15. ^m 2 Hawk. Pl. Cor. 196. Acc. ⁿ 22 Ed. 4. 39. ^o

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be killed, was dead such a Day which was two Years before the Appeal commenced, or that the Plaintiff is a Bastard, or (if the Wife brings an Appeal of the Death of her Husband) *nient unques accouple en loyal Matrimony*.

Also he may plead in Abatement and over in Bar, or take the general Issue also; as ^a Misnomer of him, or *nul tiel Ville*, and as to the Felony *not guilty*; but he shall ^b not plead a Release, and as to the Felony *not guilty*, for by the Release he hath in a manner confessed the Felony. Also he ^c may plead a Matter in Bar, and upon that found against him, then he may plead *Not Guilty*, altho' he hath not pleaded it before.

The Defendant ^d may challenge 35 Jurors without shewing Cause, which is called a peremptory Challenge.

Statutes.

22 H. 8. cap. 14. made perpetual 32 H. 8. cap. 3. *He that is arraigned of Petit Treason, Murder, or Felony, shall not challenge peremptorily above the Number of twenty.*

33 H. 8. cap. 23. *Peremptory Challenge shall not be allowed in Case of High-Treason, or Misprision of Treason.*

^e The *Tales* here may be a greater Number than the principal Pannel, as 40 *Tales*, or so many as the Court shall award, and this is in respect of peremptory Challenge.

After Acquittal a Man shall never be drawn in Question for the same Offence again; and therefore upon an Indictment of Homicide or Murder, the Justices used not (according to their Discretion) to proceed to Arraignment until the Year and Day be passed, for otherwise if he should be acquitted upon the Arraignment, the Party should lose his Appeal ^g.

[b] By the Judgment, *viz.* where a Man is convicted at

^a 4 H. 6. 15. ^b 22 Ed. 4. 39. b. 7 Ed. 4. 15. a. Per Markham contra. ^c 2 H. H. P. C. 256. contra. ^d V. 2. H. P. C. 196. 7. ^e 22 Ed. 4. 39. b. 2 H. H. P. C. 255. b. ^f St. Pl. Cor. 157. b. Dr. & Stud. 1. 1. c. 8. Fortescue, cap. 27. Co. Litt. 156. b. 3 Inst. 227. ^g 14 H. 7. 7. ^h 22 Ed. 4. Fitz. Corone, 44. But now see Stat. 3. H. 7. cap. 1. 2 H. H. P. C. 220, 249.

the Suit of the King, or in an Appeal (which Judgment or Conviction is called Attainder.)

1. *The Blood shall be corrupted*; so that a ^a Remainder limited to his right Heirs may never take effect. The ^b eldest Son (who is attainted of Felony in the Life of his Father, and survives him) or his ^c Issue (if he die before) may not inherit, and also such Attainder is an ^d Impediment that the youngest Son in such Case shall not inherit: But the Lord shall have the Land by Escheat. Otherwise it is, if the ^e eldest Son (so attainted) die without Issue in the Life of his Father, that is to say, the younger Son shall have it by Descent.

2. *His Wife shall lose her Dower*, altho' her Husband aliened before the Offence committed.

Statutes.

1 Ed. 6. cap. 12. *Notwithstanding the Attainder of any for Petit Treason, or Felony, the Wife shall have Dower.*

5 & 6 Ed. 6. cap. 11. ^g *The Wife of a Man attainted of any Treason shall not have Dower of any of his Lands, whilst the Attainder standeth in force.*

3. *In Felony, the Land which he hath in Fee shall be forfeited* ^h *to the Lord*, be it in Petit Treason; or other Felony, and at whatever Time after that he is attainted; so that ⁱ the Lord may have a Writ of Escheat before Execution. And ^k Land purchased or descended after Attainder shall be forfeited to the Lord. But ^l where the Person attainted is seized in right of his Wife, the King shall have the Issues during the Life of the Husband.

But ^m none of these three hold place in Sorcery, Sodomy, Heresy; that is, the Land, or Dower, shall not

^a 37 H. 8. Bro. Done, 42. ^b 22 H. 6. 38. ^c Dyer, 48. pl. 16. ^d 22 H. 6. 38. Bac. Elem. fo. 141. St. Pl. Cor. 195. Hob. 334. ^e Dyer, 48. ibid. 1 H. H. P. C. 356, 7. Hob. 334. Co. Litt. 8. a. Cro. Car. 435. W. Jones, 34. ^f Co Litt. 37. a. 41. a. ^g Dyer, 140. pl. 42. ^h 22 Aff. pl. 49 Bro. Escheat, 14. ⁱ St. Pl. Cor. 198. a. ^k 48. Ed. 3. 2. b. ^l 3 Ed. 3. Fitz. Corone, 327. ^m See the Statute 2 H. 5. cap. 7. now repealed, which gave the Forfeiture of Land in Case of Heresy, by which it seems that no such Forfeiture was at the Common Law against 5 Rich. 2. Fitz. Trial, 54. per Belknap.

there be forfeited, nor the Blood corrupted, because the Offences are spiritual, and Ecclesiastical Judges proceed upon them.

Execution may be by Commandment of the Judge without Writ.

A Woman ⁿ that is ensient (that is quick with Child, but not *privement* ensient) the Trial of whom ^o shall be by a Jury of Women, and the Writ in that Case is called a Writ *de ventre inspiciendo*, shall for ^p once, and no oftener, be respited Execution; but it is no Plea, upon her Arraignment, to say that she is ensient, but she shall answer to the Felony.

Prerogative.

These Things following are proper to Indictments:

[7²] ^a In Indictment of Treason, or Felony, otherwise in Appeal, the Party upon his Arraignment is not allowed Counsel if he denies the Fact; for ^a either his Conscience will force him to say the Truth, or otherwise by his Gesture, Countenance, or Simplicity of Speech, that may be discovered, which the artful Speech of his learned Counsel will conceal, or give colour to. Also he himself can better answer to the Fact; but if he pleads Sanctuary, or any other Matter in Law, then he shall be allowed Counsel *.

In an Indictment of Felony, if the Defendant confesses the Indictment, he may impeach others of the same Offence, in which Case he is called an Approver. Such ^b Approvement may not be but in Felony, or Treason, and there *viz.* upon such ^c Indictment, altho' it be after *Not Guilty* pleaded, yet before Verdict he may become an Approver; but upon an ^d Appeal a Man may not be an Approver, nor except that he confess ^e the Felony before the Judges. Which Confession ought to be upon an Indictment ^f precedent (so that the Judges may at any time give Judgment against him) not upon an Arrest for Felony. Also ^g he may not approve one who

ⁿ 22 Aff. pl. 71. ^o 22 Aff. ibid. ^p 23 Aff. pl. 2. ^q 9 Ed. 4. 2.
^a St. Pl. Cor. 151. b. * 1 H. 7. 23. V. 2. H. P. C. 400. &c. ^b 9
 H. 6. Fitz. Corone, 231. ^c 1 H. 7. 5. b. ^d 43 Aff. 39. 3 Inst.
 129. ^e 1 H. 5. Fitz. Corone, 441. 3 H. 6. 50, 51. 3 Inst.
 129. ^f St. Pl. Cor. 143. e. 3 Inst. 129. ^g St. Pl. Cor. 143.

received him, for it ought to be of such an Offence as he himself did with the other and not one who abetted him, and procured him to do the Felony, ^h for he may not acknowledge that he himself did it, inasmuch as he cannot abett himself.

And if he ⁱ prove his Appeal to be true, the Kings of this Realm have used to pardon him for his Life, and only banish him.

The Trial here shall never be by Joinder of Counties; and ^k therefore an Indictment that one hath given a Stroke to J. S. in one County, of which Stroke he died in another County, is not a good Indictment, because it may not be tried, inasmuch as the Counties may not join in an Indictment. And therefore before the Statute 2. and 3. Ed. 6. (which altered the Law in this Case) the Custom was to carry the Body into the County where the Stroke was given; but otherwise it is in an Appeal.

Upon an Indictment of Trespas, the Process ^{*} is *Venire facias*, because he shall be fined thereupon, and *Distringas*.

The Form of the *Venire facias* is, *The King to the Sheriff, &c. We command you, &c. that you omit not by reason of any Liberty, but cause to come A. B of C. in the said County, Yeoman, before, &c. to answer unto certain Articles against the said A. presented, &c. (and recites the Offence) whereof he stands indicted.*

^l But if upon the *Venire facias*, or *Distringas*, it be returned that the Party hath nothing by which he may be attached, three *Capias*'s shall issue (not *Distringas* infinite) and Process of Outlawry.

Statutes.

14 Ed. 3. cap. 4. Stat. 1. ousts the Presentment of Englishery.

^h 10 Ed. 4. 14. Fitz. Corone, 69.

ⁱ St. Pl. Cor. ibid.

^k 4 H. 7. 18.

6 H. 7. 10.

^{*} F. N. B. 92.

Old Book of J. of Peace. Vide Rast. Entr. 198. b. that upon such *Venire facias* the Sheriff returned *Nihil habet per quod*, &c. by which it seems that this *Venire facias* is but in Nature of an Attachment.

^l Rast. Entr. ibid.

25 Ed. 3. cap. 14. Stat. 5. *The Proceſs upon an Indiſtment of Felony before Juſtices of Oyer and Terminer, ſhall be two Capias's and Exigent.*

[b] 4 H. 4. cap. 2. *cuſts the Words Infidiatores Viarum & Depopulatores Agrorum in all Indiſtments of Felony.*

37 H. 8. cap. 8. *Any Indiſtment which wants the Words, with Force and Arms, Swords, Staves, &c. or any of them, ſhall be good.*

25 Ed. 3. cap. 3. Stat. 5. *No Indiſtor ſhall be put in Enqueſts upon the Deliverances of the Indiſtees of Felony or Treſpaſſes, if he be challenged for the ſame Cauſe.*

Vide Weſtmiſter 1. cap. 15. *Felons which openly be of bad Fame, and will not put themſelves in Enqueſts, concerning Felonies at the Suit of the King, ſhall be put to ſtrong and hard Pain.*

Vide Magna Charta, cap. 29. *A Peer of the Realm, upon Indiſtment of Treason or Felony, ſhall be tried by his Peers.*

20 H. 6. cap. 9. *A Dutcheſs, Counteſs, Baroneſs, married or not married, ſhall be tried in ſuch Caſes as Peers of the Realm.*

26 H. 8. cap. 13. *Any Offence (heretofore made Treason) done out of the Limits of the Realm, ſhall be inquired by twelve Men in ſome County to be appointed by Commiſſion, and upon every Indiſtment certified in the King's Bench, ſuch Proofs ſhall be had as if it was found to be done within the Realm.*

He who is reſident beyond the Sea may be outlawed for High Treason.

5 & 6 Ed. 6. cap. 11. *Accord, in the ſame Words with Proviſo, that if ſuch Outlaw yield himſelf to the Chief Juſtice of England within a Year, he ſhall be admitted to his Traverſe.*

28 H. 8. cap. 15. *All Treasons, Felonies, Robberies, Murders, and Confederacies, committed within the Jurisdiction of the Admiral, ſhall be inquired and determined as if they were done upon Land, by Commiſſion directed to the Admiral and three or four others aſſigned by the Chancellor, in the County limited in their Commiſſion.*

32 H. 8. cap. 4. *Treasons and Miſpriſions of Treason in Wales and the Marches thereof, or within the Realm,*

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where the King's Writ doth not run, shall be presented and tried in the same County by Commission of Oyer and Terminer.

35 H. 8. cap. 2. Treason and Misprision of Treason done out of the Realm, shall be inquired, heard, and determined in the King's Bench, by a Jury of the County where the said Bench shall sit, or by Commissioners in such County as the King shall appoint.

1 & 2 P. & M. cap. 10. All Trials for High-Treason shall be according to the Course of the Common Law, and not otherwise.

Vide 33 H. 8. cap. 20. He who shall fall to Lunacy after his Attainder, Conviction, or Confession of High-Treason, shall be executed, notwithstanding the same.

29 Eliz. cap. 2. No Attainder of High-Treason, (for which the Party has been executed) shall be reversed for Error by his Heir, or any claiming under him.

33 H. 8. cap. 23. Upon Confession of Misprision of [73] Treason or Murder before the King's Counsel, or any three of them; or if they vehemently suspect one of such an Offence, it shall be inquired, heard, and determined, by Commission out of the Chancery in the County or Place limited by the Commission, by such lawful Persons as shall be returned by the Sheriff or Officer who hath the Return.

2 & 3 Ed. 6. cap. 24. In Indictment of Death, or Appeal of Murder, the Trial thereof may be in the County where the Death is, that is to say, altho' the Stroke or Poisoning was in another County. Also an Accessary in one County to Murder or Felony done in another, may be indicted and tried in the County where he is accessory.

Where the King takes upon him the Suit by reason of Contempt; as if a ^a Man being sent with Money to serve him in his Wars, will not come, but spoils and wastes the Land and Goods of other Men, and does other unlawful Acts: or if the Sheriff ^b awards a Non-suit after that he hath recorded the Parol in taking of Beasts by the *Pone in Bank*, or the like; the ^c Process is, *Pone per vadios & salvos Plegios* (which is called an Attachment) and *Distringas*; but if a *Capias* issue in

^a 2 Ed. 3. 29. Declarat. de Exigendis.

^b 17 Ed. 3. 5. b.

^c Vide Stat. 18. Ed. 3.

these Cases at first, and the Party be taken by it, he shall be dismissed, because he should be by Pledges.

* Upon *Nihil* returned to the Attachment or Distress, there shall always afterwards issue a *Capias* (and therefore it is called *continual Capias*) but not Process of Outlawry, altho' that the King in many Cases shall have a Fine: But ^d Outlawry lies not, unless it be given by a special Statute, except where the Indictment, or the like, supposes Force.

Statutes.

18 Ed. 3. Stat. de Declarac. de Exigendis. *Receivers of the King's Money, or of his Money which they take of People, and detain them; those who transport Wool without being cocketed, or paying the Custom, or Subsidy assessed, and the Customers and Troners that suffer them; Lay-Ministers, who receive the King's Money, and retain the same; Conspirators, and Confederators, and Maintainers of false Quarrels; those that bring Routs into the Presence of Justices, or others the King's Ministers, in Affray of the People, so that the Law may not be done; and those who come into their Company; they which bring in false Money in deceit of the People: Against all these, in case they may not be found nor brought in to answer by Attachment or Distress, the Exigent shall issue, and not against any other.*

18 Ed. 3. cap. 5. Stat. 2. *No Exigent shall issue where a Man is indicted of Trespass, if it be not against the Peace, or of Things contained in the said Stat. 18. Ed. 3. de Declar. de Exigendis.*

The King's Counsel in the Court of Star-chamber have Power to punish Contempts, especially such which are of the greatest Inconvenience, but not such for which the Party shall lose a Member. And herein they proceed by English Bill^e.

[b] Vide 3 H. 7. cap. 1. *The Chancellor, Treasurer, and Privy-Seal, or two of them, calling to them a Bishop, and a Temporal Lord of the King's Counsel, and the chief Judges, may examine Riots, Maintenances, &c.*

* 7 Ed. 3. 5. b. Stat. 18. Ed. 3. supra. 35 H. 6. 6. b.
^d Ante, 69. b. * Vide 16 Car. 1. c. 10.

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Vide 21 H. 8. cap. 20. *The President of the Council is added to the Chancellor, Treasurer, and Privy-Seal.*

In pecuniary Mulcts given by Statute, if the Statute limits any Part to the Party grieved, or to whosoever will sue for the King and himself, the Suit is called an Information.

Statutes.

4 H. 7. cap. 20. *Where a Man sues a penal Statute by Covin to defraud the Suit of another, there the Party who sues bona fide may aver that the first Recovery, or the first Bar, was by Covin, except the Recovery was by Verdict upon the Point of the Act. So of such covinous Release.*

27 Eliz. cap. 11. *An Information for the King upon the Statute of Tillage, shall be brought within five Years.*

31 Eliz. cap. 5. *None but the Party grieved shall be received to inform, who for any Misdemeanor hath been ordered to the contrary in any of the Queen's Courts.*

The Offence shall be laid in the County where it was done; Champerty, and certain others, are excepted: See them.

This Statute does not extend to Officers of Record, who, in respect of their Offices, exhibit Informations.

Where the Forfeiture is to the Queen alone, the Information or Indictment shall be brought within two Years; where to the Queen and any one that will sue, it shall be brought within one Year, except upon the Statute of Tillage, and the Statutes which limit a shorter Time.

All Suits upon any Statute for using any unlawful Game, or concerning Bows and Arrows, or Apprentices, shall be in the Quarter-sessions of the Peace, or at the Assizes, County, or, &c. or inquired, heard, and determined at the Assize, Quarter sessions, or in the Leet within which the Offence shall be done.

29 Eliz. cap. 5. *Upon an Information in the King's Bench, common Pleas, or Exchequer, where the Defendant is bailable, or with License of the Court, may appear by Attorney, at the Day contained in the first Process he may appear by Attorney, and shall not be put to put in Bail.*

[74] 31 Eliz. cap. 10. *The Statute of 29 Eliz. shall be expounded to extend only to natural born Subjects and Persons made free Denizens.*

These Things following are proper to Appeals.

To an ^a Appeal of Felony.

It lies against a Feme covert without naming her Husband; so it ^b is not in other Actions.

If the Defendant ^c pleads a Plea by which his Life shall come in danger, the Plaintiff shall not imparl, but shall answer *sedente curia*.

The Trial may be by ^d Battle, at the Election of the Defendant, which shall be herein in proper ^e Person.

And hereupon the Defendant is restrained that he shall not chuse Battle, but shall be tried by a Jury, if there be any notorious Presumption of the Fact in him, as that he ^f broke Prison, or escaped and fled as he was going to Prison, or that he was ^g indicted of it. So in Appeal of Murder, that he was ^h taken in the Act with a bloody Knife; in Appeal of Robbery, that upon fresh Suit and Hue and Cry he was taken with the Mainer, *viz.* having some Money about him. So if there be any Presumption of Imbecillity in the Plaintiff, ⁱ as if he be maimed, an Infant, or the like.

Statutes.

Vide 6 Rich. 2. cap. 6. *supra.* ousts Battle in Appeal of Rape.

If a ^k Peer of the Realm be Plaintiff in an Appeal, Battle shall not be waged against him.

The Defendant ^l being acquitted shall have Judgment to recover Damages against the Plaintiff. And if the Plaintiff ^m be not sufficient, then the Common Law and common Reason willeth that he should recover his Damages against those who procured or abetted the Plaintiff to pursue his Appeal. But these Damages

^a 1 H. 4. 5. St. Pl. Cor. 62. a. ^b 18 Ed. 4. 4. ^c 22 Ed. 4. 19. b. ^d See the Manner of waging Battle, and the performing of it, 1 H. 4. 3. 17 Ed. 3. 2. ^e 9 Ed. 4. 35. ^f 1 Aff. pl. 6. ^g 22 Ed. 4. 19. b. ^h 6 H. 3. Fitz. Corone, 411. Fleta, l. 1. c. 31. pl. 2. ⁱ 22 Ed. 4. 20. ^k The Book, which is intituled a Discourse of the Customs of London, fo. 13. But I do not remember any Authority in this Point. ^l Kelwey, 27. a. ^m Stamf. P. C. 167. c.

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against the Procurers or Abettors were to be recovered at the Common Law only by Writ Original, that is to say, by Writ of Conspiracy, and not otherwise.

Statutes.

Vide Westminster 2. cap. 12. *"He that is acquitted upon an Appeal or Indictment of Felony, may have the Abettors inquired, and shall have a judicial Writ for his Damages against them."*

Vide 8 H. 6. cap. 10. *He that is duly acquitted by Verdict upon an Indictment or Appeal of Treason, Felony, or Trespass, shall have an Action upon the Case, if the Appellant is not sufficient, against him who procured the same, and like Process shall be as in a Writ of Trespass with Force.*

An Appeal of Death, Murder, or Homicide, none may have but the Heir only; for the Husband shall not have an Appeal of the Death of his Wife, but the Son; the younger Brother of the whole Blood shall have the Appeal, and not the eldest Son of the half Blood, but the elder Brother of the whole Blood shall have it °. [b]

Statutes.

Magna Charta, cap. 34. *A Woman shall not have an Appeal of the Death of any other than of her Husband.*

Gloucester, cap. 9. *No Appeal shall be abated so soon as heretofore; but if the Appellor count the Deed, the Year, the Day, the Hour, Time of the King, and the Town where the Deed was done, and with what Arms he was killed, the Appeal shall stand; it shall not be abated by default of fresh Suit, if he sue within the Year and Day.*

2 Ed. 6. cap. 24. *Indictment or Appeal lies in the County where he d. ed, altho' the Poisoning or Stroke was in another County.*

3 H. 7. cap. 1. *He who is acquitted upon an Indictment of Murder, or Homicide, or as accessory, shall not go at large until the Year and Day be passed; within which Time an Appeal may be sued (if Clergy was not had*

° Fleta, lib. 1. cap. 34. pl. 46, 47.
7 Ed. 4. 15.

° St. Pl. Cor. 59. a. b.

THE THIRD BOOK

before) and all Advantages shall be saved, as if the Acquittal had not been.

Same Law against the Accessary, altho' the Principal was attainted at the Suit of the King.

In Appeal of Maihem, the Plaintiff shall recover but Damages.

Prerogative.

The King in many of the Offences above shall have a Forfeiture sometimes of his Land, sometimes of his Goods, in ^a Possession or in Right, as Land whereof he is ^b disseized, ^c Debts, Goods ^d for which a Man is accountable to him, or which were ^e wrongfully taken from him, &c. otherwise it is of ^f Battery, ^g Trespass, in his Land, or the like, where he is to recover but Damages.

The Forfeiture of Land, or the like ^h, relates to the Time of the Offence, be the Attainder by Outlawry, Verdict, or otherwise; of Chattles, (although it be a ⁱ Lease for Years) to the ^k Time of the Conviction, so that a ^l Sale or Gift of them before, is good, for he shall ^m live upon them; for which Reason, ⁿ after Indictment, his Goods shall not be removed out of his House, but shall be in keeping of his Neighbours.

In all Forfeitures of Goods, that is to say, upon an ^o Indictment *de Fugam fecit*, or if a Man ^p be taken with the Mainer upon a Robbery, or ^q tarry the Exigent, the Town is charged with them; and therefore ^r they may be seized in whatever Place they are.

Statutes.

[75] *Vide 31 Ed. 3. cap. 3. No Man, or Town, shall be charged in the Exchequer by Estreats of Justices, of the Chattles of Fugitives or Felons, if they alledge that another is chargeable.*

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| ^a 29 Aff. pl. 63. | ^b 6 H. 7. 9. | ^c 29 Aff. pl. 63. |
| ^d 50 Aff. pl. 5. | ^e 29 Aff. pl. 63. | ^f 29 Aff. ibid. |
| ^g 28 Ed. 3. 92. | ^h 30 H. 6. 5. | ⁱ 8 Co. 171. b. |
| ^j Co. Litt. 391. a. | ^k 8 Ed. 4. 4. | ^l 8 Co. 171. b. |
| ^m 7 H. 4. 47. | ⁿ Fitz. Corone, 83. | ^o Bro. Forfeiture, 10. |
| ^p 5 H. 4. Fitz. Forfeiture, 32. | ^q 3 Ed. 3. | ^r Fitz Corone, |
| ^s 347. | ^t 22 Aff. pl. 81. | ^u 22 Aff. ibid. |

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Vide 1 Rich. 3. cap. 3. *No Sberiff, &c. or other Person, shall seize the Goods until Conviction or Attainder, on Pain, &c.*

In Treason and Felony ^a, all that he hath for Life, and his Chattels, shall be forfeited.

In Treason ^b, the Land which he hath in Fee of whomsoever it be holden.

Statutes.

26 H. 8. cap. 13. *Every Offender convicted of High-Treason, by Presentment, Confession, Verdict, or Process of Outlawry, shall forfeit to the King all his Lands, &c. that he hath of any Estate of Inheritance in Possession, or use by any Right.*

5 & 6 Edw. 6. cap. 11. *In the same Words, but that this Statute saith, which he hath, &c. in his own Right.*

33 H. 8. cap. 20. *Upon Conviction of High-Treason by Parliament, or by Course of Law, the King shall have as well Uses, Rights, Entries, Conditions, as other Things, and shall be deemed in actual Possession without Office.*

In Felony, all his Land, as well that which ought to Escheat to the Lord, as other which he hath punishable of Waste, viz. whereof he is seized in Right of his Wife, or the like, may be laid Waste by the King, by pulling down of Houses, rooting up Trees there growing, digging up the Earth, &c*.

Statutes.

Magna Charta, cap. 22. *The King shall not have the Land of those who are convicted of Felony, but for a Year and a Day, and then shall render it to the Lord.*

Prerogativa Regis, cap. 16. *The King shall have the Profits for a Year and a Day, and afterwards shall waste the Tenements.*

† A *Felo de se*, that is, one who murders himself, shall forfeit only his Chattels, but his Land ^d shall not

^a St. Pl. Cor. 186. b. ^b Co. Litt. 13. a. Bac. Elem. 131. 22 Aff. pl. 49. Stat. 25 Ed. 3. De Prodic. which is in Affirmance of the Common Law. 3 Inst. 18, 19. ^c Dyer 238. b.

^{*} 3 E. 3. Fitz. Corone, 327. St. Pl. Cor. 190. † Bac. Elem. 110, 139. ^d Britton, cap. 7. Flota, lib. 1. cap. 36.

3 Ed. 3. Fitz. Corone, 362. 22 Ed. 3. 256. St. Pl. Cor. 19. c. Plowd. 261. 3 Inst. 55.

be thereby forfeited, nor his Blood corrupted, nor the Dower of his Wife lost, because it is not any Attainder in Deed; but he shall^e forfeit his Chattels Real and Persona^l, Debrs, &c. and this Forfeiture shall have Relation to the Time of the^f Act in his Life, which was the Cause of his Death. So that the Husband and Wife^g being possessed jointly of a Term for Years, if the Husband drown himself, the Term is forfeited to the King, and the Wife, who survives, shall not have it, for the Title of the King is, the casting^h of himself into the Water, which was before the Title of the Wife by Survivorship. And this Forfeiture is as strong to give thisⁱ, as an Express grant, which the Husband might have made, and thereby have barred his Wife.

[b] He, who kills a Man by Misfortune^k, or Misadventure, in the doing of a lawful^l Act (but not if A. and B. are fighting, and C. who came to part them be killed by any of them, although it be without any ill Intent, for this is Felony at the least, if it be not Murder in him who killed him, because the Thing they were doing was unlawful) or if it be in his^m own Defence, (which is called *se Defendendo*) if heⁿ run away as long as he could to save his Life, for otherwise it is Felony in him, tho' the other pursue him, he shall forfeit his Chattels, and is put to his Charter of Pardon.

Statutes.

Gloucester, cap. 9. See this hereafter in the Writ of *Odio & Atia*.

^e 8 Ed. 2. Fitz. Corone, 426. ³ Ed. 3. Ibid. 301, 362. 22 Ed. 3. 256. St. Pl. Cor. 188. i. et Stamf. Prærog. 46. a. 8 H. 4. 2. Per. Tillesley. Plowd. 261. ^f Plowd. 259. ^g Ibid. 260, 261. ³ Inst. 55. ^h Plowd. 259. ⁱ Ibid. 260. ^k 2 H. 4. 18. ³ Ed. 3. Fitz. Corone, 302. Co. Litt. 391. a. ² Inst. 149, 316. ³ Inst. 57. 220. Fleta, l. 1. c. 23. pl. 15. Kelwey, 108. a. b. ^l Fleta, l. 1. c. 23. pl. 5. St. Pl. Cor. 15. a. ³ Inst. 56. ^m 14 H. 7. 2. 15 Ed. 3. Fitz. Corone, 116. ² Inst. 316. ⁿ 43 Aff. pl. 31. ^e 8 Ed. 2. Fitz. Corone, 389. But the Law is held otherwise at this Day, unless they were sever'd before the Accident happen'd. 1 Hawk. P. C. 66. T. Raym. 97. Hide, C. J. denied the Case 8 Ed. 2. Fitz. Corone, 389. to be Law.

Where

Where any Thing, which hath not Reason, kills a Man, as the ^c Wheel of a Mill, where a Man falls from a Bridge into the Water, and by the Violence of the Water is carried under the outward Wheel of the Mill; the Corn^d Mow from which a Man falls and dies: this and all that ^e moves along with it is forfeited to the King; as if A^f. being upon a Cart carrying of Faggots, and as he is binding them, he falls by the Motion of one of the Horses in the Cart, by which he dies, not only that Horse, but all the other Horses, and the Cart itself shall be forfeited. And this is called a *Deodand*.

Goods *confisk* and *waived* belong to the King, if he ^g seize them before the Owner; same Law where the Lord of the Franchise seizes them. Goods ^h *confisk*, are such wherein a Thief (being attainted for stealing another Thing, for if it be for stealing the same Goods, they are said to be forfeited, not Goods *confisk*) disclaims to have any Property. Waived, are such ⁱ Goods as the Thief, (but not he who commits a Trespass) waives. But if he, of whom the Goods were stolen do first seize them (although it be not in twenty Years after they are stolen) or make fresh ^k Suit, viz. do all his Endeavour to take the Thief, whether he be taken at his Suit, or not, and ^l convict him after upon an Appeal, he shall have them again.

Statutes.

21 H. 8. cap. 11. *The Party shall have Restitution of Goods stolen without fresh Suit, if he, or another by his Procurement, give Evidence upon the Indictment.*

As to Offences to the Public.

He ^m that strikes a Man in Westminster-Hall, or a ⁿ Juror in the Presence of the Justices, shall forfeit his Lands and Chattels.

^d 3 Ed. 3. Fitz. Corone, 348. ^e Fleta, l. 1. c. 25. pl. 9.
³ Inst. 57. ¹ Hawk. P. C. 66, 67. ^f 8 Ed. 2. Fitz.
 Corone, 397. ^g 21 Ed. 4. 16. Dr. & Stud. l. 2. c. 3.
^h 3 Ed. 3. Fitz. Corone, 371. ⁱ 12 Ed. 4. 5. ⁵ Co.
 109. a. ^k 21 Ed. 4. 16. ^l 7 H. 4. 43. 6. ^m 41
 Ed. 3. Fitz. Corone, 280. Ante 29. b. and the Books there
 cited. ⁿ 19 Ed. 3. Fitz. Judgment, 174. Ante 29. b.

THE THIRD BOOK

For * Misprision of Treason, the Profits of his Land during Life, and his Chattels.

Upon ^p *Fugam fecit*, tarrying ^a till the Exigent, and in ^r Outlawry, his Chattels: A Lease for Years as well as Chattels Personal; and the ^r Profits of Land, whereof he hath a Freehold; but in this Case, the King may not seize the Land itself, nor plough, sow, or grant it over; and if the Outlaw makes a Feoffment, the Feoffment is good, and the King after this shall not have the Profits: neither shall the King have a Thing ^t fixed or annexed to the Freehold, as a Furnace, Windows, or the like.

In ^u Usury, the Offender shall forfeit his Goods which he hath at the Time of his Death, that is, by the ancient Law.

C H A P. III.

Of Common Pleas.

[76]

COMMON Pleas, are such as are to Remedy any Wrong, where the Common Pleas ^a is the proper Court, and the ^b Fleet is their Prison, and also the Prison of other Courts, viz. the Chancery and Exchequer.

These Pleas are holden before the Justices, and ^c therefore the Form of a Writ returnable there is, *That he be before our Justices at Westminster, &c.* and the Records there are stiled, *The Records of the Justices of the Bench*; the Records of the King's Bench are stiled, *The Records of the King*.

* St. Pl. Cor. 37. c. & 38. the Land shall be forfeited, but some say he holds Opinion, that the Profits only shall be forfeited. 6 Ed. 6. Bro. Treason, 19. agrees that the Profits of the Land shall be forfeited. ^p 27 Aff. pl. 50. ³ Inst. 232.

Kelwey, 68. b. ⁵ H. 4. Fitz. Forfeiture, 32. ^a 22 Aff. pl. 81. ^r 9 H. 6. 20. ^s Ibid. 21 H. 7. 7. Plowd.

541. ^t 20 H. 7. 13. b. ^u Vide Stat. 15 Ed. 3. cap. 5.

^a Plowd. 320. Co. Litt. 71. b. ^b Dyer, 204. pl. 76.

^c 37 H. 8. 15. Co. Litt. 71. b. ² Inst. 22. ⁴ Inst. 76.

Statutes.

Statutes.

Magna Charta, cap. 11. *Common Pleas shall not follow our Court, but shall be holden in some certain Place.*

Where two or more have or give jointly Cause of Action, they may sue or be sued together, which is called a *Joinder in Action*^d. If A. is bound to B. in a Statute Merchant, and afterwards C. is bound to the same B. in another Statute, and B. by one Deed releases to both, and afterwards sues Execution severally, they shall join in an *Audita Querela*, because of this joint Release. So one *Decies tantum* shall be against all the Jurors that take Money to give their Verdict, for this is their entire Act.

In a Joint Action against two or more, as in ^f Debt (otherwise in a Writ of ^g Conspiracy against two, for they are several Torts) and the one appears, he shall not answer, but shall have same Day, until the other come in, ^h or the Suit be determined against him by Death, Outlawry, or the like.

ⁱ A Condition annexed to a Freehold, or Inheritance, shall not be pleaded, except it be by Deed, any more in a Personal than in a Real Action; but a Condition ^k annexed to a Lease for Years, or a Grant of a Ward, or other Chattel Real, may; yet ^l the Jury, upon the General Issue pleaded, viz. (*null Tort, null Disseizin in Assize*) may find the Condition if they will; and by that the Party shall have Advantage.

The Heir or Executor, in Action against them, if [b] they plead a Matter in their own Knowledge, which goes in perpetual Bar (as if the ^a Heir pleads *riens per Descent* from the same Ancestor, the ^b Executor, a Release, or Acquittance made to himself, or that he was

^d 20 Ed. 3. Fitz. Audita Querela, 28. ^e 36 H. 6. 28. b.
 21 H. 6. 22. Bro. Join'd in Act. 66, 100, 108. ^f 48 Ed.
 3. 1. b. ^g 1 H. 7. 25. b. ^h 41 Ed. 3. 3. ⁱ 9 Ed.
 4. 25. b. 26. 6 H. 7. 8. b. 11 H. 7. 22. b. 7 H. 6. 7.
 14 H. 8. 22. b. 28 Aff. pl. 1. Dr & Stud. l. 1. c. 8. Co.
 Litt. 225. a. ^k Littlet. §. 365. ^l Littlet. §. 366. ^a 21
 Ed. 3. 9. b. 8 Co. 134. a. 1 Vent. 95 Dyer, 149. pl. 80.
 Plowd. 440. ^b 34 H. 6. 22. Bro. Executor, 22. 1 Vent.
 95.

never Executor, and never administred as Executor) shall be charged as in their proper Duty, if this pass against them. Otherwise it is, if the Executor plead *Misnomer*, or another Executor alive not named in the Writ (for this is not in Bar, but to the Writ) or nothing in his Hands (for this is not a perpetual Bar, because a *Scire Facias* lies, if he hath Affets after) or a Release or Acquittance to their Testator, or not the Deed of their Testator, for they may not have Knowledge thereof. Otherwise it is also, if the Heir or Executor are condemned by a ^d *Nihil dicit*, or confess the Certainty of Affets. And in the ^e first Case, that is to say, where the Heir pleads *riens per Descent*, &c. which is found against him, the Plaintiff shall have an *Elegit* of the Moiety of all his Lands, whether Lands purchased or descended; as in a *Formedon in Descender*, if the Tenant plead in Bar a Warranty with Affets, and the Demandant saith he hath nothing by Descent, and it is found, that he hath by Descent, he shall be barred of all that he demands by his Writ (of how ever small Value that be which descends) for that the Issue which he hath tendered is false.

^f In any Real or Personal Action whatsoever, he that recovers shall, within a Year, have a Writ of *Habere facias seizinam, fieri facias*, or the like, as the Case is, against the same Party to execute the Judgment, without any further pleading. But this does not lie, except between the Parties to the Recovery, not for or against a Successor or Executor ^g, nor against the Husband, for there ^h before the Statute Westminster 2. cap. 45. he was put to a new Original, that is to say, an Action of Debt, and now is put to a *Scire Facias*; but if Judgment ⁱ be given in the Common Bench, and removed into the King's Bench by Writ of Er-

^e Hob. 199. ⁱ Sid. 448. ^g 8 Co. 134. a. b. ^d Dyer, 81. pl. 62. ^f Plowd. 440. ^e 21 Ed. 3. 9. b. Dyer, 149. pl. 80. ^f 14 H. 7. 15 & 19. b. 15 H. 7. 5. 2 Inst. 471. Carter, 180, 181. ^g 28 Ed. 3. Fitz. Scire Facias. 77. ^h Post. 82. a. 101. b. 3 Co. 12. a. 5 Co. 88. a. 15 Co. 88. a. 21 Aff. p. 14. 14 H. 7. 15. 15 H. 7. 5. 2 Inst. 471. Cro. Eliz. 416. pl. 10. Godb. 372, 373.

ror, and the Judgment affirmed within the Year, they shall award a *Capias ad Satisfaciendum*, or a *Fieri Facias*, or the like, and the Plaintiff is not put to a *Scire Facias*, altho' it be in another Court.

Prerogative.

No ^k Action lies against the King, but in lieu of an Action against him, Petition shall be made to him in the ^l Chancery, where Pleas are holden before ^m the King, and the Entry is, "*Before the Lord the King in Chancery*," but "*before ⁿ the King*," generally, is intended in the *King's Bench*. Sometimes also Petition is such in ^o Parliament.

And Petition in Case of Land, or the like, shall be sued, altho' the King has granted it over ^p; for upon an Office found that J. S. (who was attainted of Felony, or Treason, by Matter of Record before) was seized of certain Lands, if the King seize and grant the same over, yet a Stranger, who hath Right to enter, or to have his Action, shall not have the one, nor the other, against the Patentee, but shall sue to the King by Petition.

[77]

^q If the Escheator seizes Goods without Cause, or the Goods of a Man outlawed, and Accounts for them in the Exchequer, although the Outlawry is afterwards reversed, yet the Party shall sue for them by Petition. But so long as Personal Things, seized for the King, remain in the Hands of an ^r Officer, he who hath Right, may traverse the Records that entitle the King, and so shall have his Goods again; or may sue the Officer, or hinder him from taking the Profits, as where it is found, that one outlawed in a Personal Action was seized of certain Lands, and in this Case, he shall not be put to his Petition, otherwise it is in Case of a Freehold or Inheritance.

In a Petition, along with the Right of the Party, all the Titles of the King shall be mentioned, or it shall

^k Ante 20. b. ²¹ H. 7. 2. ¹⁴ H. 8. 3. b. Plowd. 241.
 Stamf. Prær. 42. b. ² Inst. 187. Fleta, l. 1. c. 8. pl. 4.
¹ 21 Ed. 3. 47. ^m 28 Aff. pl. 52. ⁿ 9 Co. 99. ^o Stamf.
 Prær. 72. ^p 9 H. 6. 15. Post. 128. a. ^q 34 H. 6. 5. ^r 4
 Ed. 4. 24. Post. 128. b.

abate ;

[60] abate; the Reason is, because upon an Issue in the Petition found against the King, he shall be concluded for ever from claiming by any of the Points contained in the Petition^a.

The Form of the Petition is, "*Humbly petitioneth to your Royal Highness your Liege Subject A. B. that whereas (and so disclosing his Right) all, and singular, whereof the same your Petitioner is ready to verify, by Ways and Means as may seem meet. Therefore may it please your Majesty, to take the Premises into your gracious Consideration, and to the same your Petitioner, to order Right and Justice to be done; and also upon a due and lawfull Trial of the Right and Title of the same your Petitioner upon the Premises, to order Restitution of the same to be made to him in this Behalf, out of your Majesty's Zeal for Justice, and Regard for Charity.*"

Where the King hath granted the Land over, a *Scire Facias* shall issue against his Grantee to maintain his Title^b; as if the King grants over his Ward, or any other certain Estate in the Land, the *Scire Facias* for him who sues the Petition, shall be against the Patentee, not against the Heir, in whose Right the King is seized, for he is not to plead with the Heir, but with the King, or him, who hath his Interest: And in a Petition to revoke Letters Patent to two, &c. and one *Scire Facias* thereupon, the Death of one of the Patentees shall not abate the Petition, for the Petition is not sued against the Patentees, but against the King, and it is not requisite to name them in the Petition, but in the *Scire Facias* only^c. In the same manner shall issue a *Scire Facias* to repeal a void Patent, and this, as well at the Suit of the King, as of the Party grieved: But he who claims by the elder Patent, shall always have the *Scire Facias* against him; who claims by the younger Patent, not *e converso*^d.

In any Case whatsoever, where the King, being made a Party, may be at a loss, (as where in a *Præcipe quod reddat*, or other real Action, against his Lessee, he prays

^a 9 Ed. 4. 32.

^b Stamf. Prær. 76.

^c 7 H. 4. 33. b.

^d 21 Ed. 3. 47.

Dyer, 197. b.

Dyer, 277. pl. 54.

in Aid of the King, but not in ^a *Trespass*, *Ejectione Firme*^y, or such other Personal Actions, for there he shall lose nothing) a Writ of Search shall issue out, which is to search in the Treasury before the Plea proceeds, if by likelihood any Matter may be there to maintain his Title; as upon Office found^a that A. died seized of certain Lands holden of the King, without Heir, and a Traverse put in, that A. did not hold of the King; but if a Man say, that A. hath Issue B. who infeoffed him, there no Search shall be had, for there can be no Matter in the Treasury to prove whether A. had Issue or not; same Law, if the Title of the King be by Alienation in Mortmain. No Search^b shall be had, but where a Man sues to the King by Petition, but it shall be^c as well where the Petition is sued in Parliament, as elsewhere, and altho' the King hath granted the Lands over.

[b]

The Form is, *The King to his Treasurers and Chamberlains, Greeting; We command you, that you search the Rolls, Remembrances, Writings, Evidences, and other Muniments touching (such Land) being in our Treasury now under your Care, and that which you find therein, you distinctly, and plainly, under the Seal of the Exchequer, certify to us in our Chancery, in fifteen Days of Easter, wheresoever we shall then be, &c.*

Statutes.

14 Ed. 3. cap. 14. *In every Petition and Search, after the four Writs returned, whether the Muniment or Remembrance be found for the King, or not, the Party shall be put to answer; so that always each of the four Writs be delivered to the Treasurer and Chamberlains, forty Days before the Day of the Return.*

An Issue joined upon Matter in Fact, shall be sent into the King's Bench to be tried, and there Judgment shall be given, and Execution sued, without being remanded into the Chancery*.

^a 27 H. 8. 28. b. ^r Dyer, 320. a. ^a 9 Ed. 4. 52. b.
^b 7 H. 5. Fitz. Petition, 6. ^c Stamf. Prær. 73. ^{*} 21
H. 7. 38 & 36. 5 Co. 92. a. 9 Co. 99. a.

Upon Judgment against the King, he is presently out of Possession; and therefore every Judgment is in itself an *Amoveas manum* or an *ouster le Main* †.

Note, ^d the Chancery is also a Court of Equity to moderate the strictness of the Common Law, according to Equity and good Conscience, by an absolute Power, and there it proceeds by English Bill; but in ^e Matters depending before it by Writ Original, and according to its ordinary Power, it is to judge according to the Common Law.

Statutes.

14 H. 8. cap. 8. *The Six Clerks of Chancery may marry.*

Vide 17 R. 2. cap. 6. *When a Man is made to come before the King's Council, or into the Chancery, by Writs founded upon untrue Suggestions, the Chancellor shall award Damages to him.*

Vide 15 H. 6. cap. 4. *No Writ of Subpœna shall be granted, until Surety found to satisfy the Party grieved his Damages, if the Matter contained in the Bill cannot be made good.*

[78] Also the King, for all Things which concern his Revenues, hath the Court of Exchequer, where the Judges are called Barons †.

Statutes.

14 Ed. 2. De Vicecomiti et viridi cerâ. *The Process against a Sheriff and his Ministers in the Exchequer, that is to say, at the Suit of Debtors who have Tallies, shall be Grand Distress, alias, and Proclamation, and if he do not come upon the Proclamation, he shall be convicted, and shall render Damages.*

The Form of putting Estreats into the Exchequer. See the Statute.

5 Rich. 2. cap. 9. *The Barons shall have Power to bear every Answer to any Demand whatever, and to give Discharge to the Party.*

1 R. 3. cap. 14. *Collectors of Dismes, who come in by Process into the Exchequer, and enter in their Ac-*

† 10 Ed. 3. per Stamf. Prær. 78.
^e Plowd. 72.

^d Plowd. 320.

^a 11 Ed. 4. 9.
 2 Inst. 551. 4 Inst. 105.

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count, shall not be obliged to answer Bills there put against them, by reason of their entring into Account, but only for the Matter touching the said Account.

31 Ed. 3. cap. 12. Error in the Exchequer shall be reversed before the Chancellor and Treasurer, with the Justices and other Sages, such as it shall please them; the Barons shall be there to hear the Causes of their Judgments: The Roll shall be afterwards remanded to the Exchequer, to make Execution.

31 Eliz. cap. 1. If the Chancellor or Treasurer, or both the Chief Justices come at the Day of Adjournment in the Writ of Error, there shall be no Discontinuance.

In this Court an ^a Information of Intrusion lies for an Intrusion, though it be but a Trespass, upon the Land of the King; where a Continuando^b shall never be absolutely alledged, but only *diversis diebus et vicibus*, for an absolute Continuance shall not be supposed against any, but against him who may gain Possession by Wrong, which none may do against the King.

The Party convicted thereof shall ⁱ be removed out of Possession, although the Intrusion be but a Trespass in its Nature.

Statutes.

Statute De Bigamis, cap. 4. Of Purprestures and Occupations upon the King, if the Usurpers be alive, the King shall seize them.

The Escheator of every County, is the Officer to the Chancery and Exchequer, to whom all their Process, as to such Matters as concern the King's Revenue, shall be directed^k.

In the Exchequer, there is also a Court of Chancery, called the Exchequer Chamber.

^a Plowd. 561. F. N. B. 90. i. Dyer. 352. pl. 28. ⁱ Co. 16. b. 40. b. ³ Co. 7. a. 9. b. ⁵ Co. 52. a. 93. b. ^b Plowd. 546. ⁱ Plowd. 561. F. N. B. 90. i. ^k 4 Co. 57. a. ⁴ Inst. 225. Post. 127. b.

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CHAP. IV.

Of Real Actions.

ACTIONS also are *Real* or *Personal*.

Real, which are to recover Matter of Inheritance, or for Life.

Statutes.

Gloucester, cap. 1. *A Man shall recover his Costs and Damages in a Writ of Entry sur Disseizin, against him who is found Tenant after the Disseizin. Also in a Mortdancestor, Cosinage, Aiel, Besaiel, and in a Writ of his own Intrusion, or his own Ass.*

The Action being brought by many, if one will not sue any more, the others may, and it shall be severed¹.

The Form of the Entry is, *B. heretofore demanded, &c. against C. the Manor, &c. with the Appurtenances as the Right of him the said B. and A. (by Formedon in Descender) and the aforesaid A. at the same time Demandant did not come, so that it was commanded to the Sheriff, that he summon him by good Summoners, that he might be here on, &c. to follow at the same time. And now here at this Day comes the aforesaid B. by, &c. and the aforesaid A. on the fourth Day of the Plea, being solemnly called, did not come, and was at the same time Demandant, &c. and the Sheriff now returns, that he summoned, &c. Therefore it is considered, that the aforesaid B. follow alone, without him the said A. against the aforesaid, for the Moiety of the Manor aforesaid, &c. with the Appurtenances. And therefore the same B. demands against the aforesaid C. the Moiety of the same Manor, &c. with the Appurtenances.*

Actions Real, are either in the Right, or in the Possession; and each of them is either of a nude Right or Possession, descended from one's Ancestors (which is called in one Case, *Auncestral Droiturel*, or in the

¹ 10 Ass. pl. 12.

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other, *Auncestral Possessory*) or of a Right or Possession otherwise vested in himself^m.

Statutes.

Merton, cap. 8. *The Count of Seizin of one's Ancestor in a Writ of Right, shall be from the Time of Henry 2.*

In a Mortdancestor, Writ of Neif, and of Entry, from the last Return of King John out of Ireland. [79]

In Assize of Novel Disseizin, from the first Passage of Henry 3. into Gascoign.

Westminster 1. cap. 38. *The Count of Seizin of one's Ancestor in a Writ of Right, shall be from the Time of Rich. 1.*

In Assize of Novel Disseizin, and Nuper Obiit, from the first Passage of Henry 3. into Gascoign.

In Mortdancestor, Cofinage, Aiel, Writ of Entry, and Writ of Nief, from the Coronation of Henry 3.

Westminster 2. cap. 2. *Seizin, in an Avowry of the Seizin of an Ancestor, or Predecessor, shall be from the Time that the Writ of Novel Disseizin runs.*

32 H. 8. cap. 2. *Seizin in a Writ of Right shall be within 60 Years.*

In Mortdancestor, or in other Possessory Actions, upon the Possession of his Ancestor or Predecessor, shall be within 50 Years.

Writ of Possession of the Plaintiff himself, shall be within 30 Years.

Avowry or Conizance for Rent, Suit, or Services of the Seizin of his Ancestor, or of himself, shall be within 40 Years.

Formedon in Remainder, Reverter, or Scire Facias upon a Fine, shall be with 50 Years after the Title accrued.

If a Man prescribe in Land, Rent, or the like, of the Possession of his Ancestor, or Predecessor, he shall alledge Seizin in them within 60 Years next before the Time of Prescription, Title, or Claim.

1 Mar. cap. 5. *The Statute 32 H. 8. shall not extend to a Writ of Right of Advowson Quare Impedit, Jure Patronatus, Assize of Darrien Presentment, Right*

^m 14 Ed. 4. 23. 6 Co. 3. b. 2 Inst. 241.

of Ward, Ravishment of Ward, or Seizure of Ward of any Lands holden in Chivalry; but the Time of Seizin in them alledged shall be as it was at the Common Law.

[b] In those which are in the Right, and not meer Possession, the Demandant shall lay the Explees in his Count; as ^a in a *Plea of Land*, the taking of the Profits of the Land, as Arable, Meadow, Pasture, &c. * if of a Pond, then by the taking of Fishes there, as Breams, and the like; in a ^b Writ of *Right of Advowson*, the Esplees shall be laid in his Clerk, by taking of the great and small Tithes; in ^c *Affize of the Office of Filizer*, or the like, the Seizin shall be alledged, by the taking of 4 d. for a *Capias*; in a ^d *Quod permittat*, by taking of Common by the Mouths of his Cattle; in ^e *Nativo Habendo*, the Esplees shall be laid in the Villain, viz. in taxing him high or low at his Pleasure, and in making his Profit of him, to drive his Cattle, carry his Dung, and do all other Villain Service, &c.

^f But in a *Writ of Escheat*, Writ of *Right sur Disclamer*, and the like, which are founded upon the Seigniority, but not upon any Seizin of the Land itself, Esplees shall not be alledged. And these Esplees, where they are to be laid, shall be in himself, if the Action be brought of his own Seizin, in his Ancestor, if it be brought of the Seizin of his Ancestor; where it may not be but of the Seizin of another, there it shall be laid in them; as ^g in a *Formedon in the Descender*, the Esplees shall be only in the Donee; in a *Formedon in Remainder*, for an Estate Tail, only in the particular Tenant to prove the Estate Tail executed; in a *Formedon in Reverter*, they shall be laid in the Donor and Donee, for the Fee Simple is demanded; in a Lease for Life, Remainder in Tail, and Lessee for Life, and he in Remainder in Tail die, the Issue in Tail shall have a *Formedon in the Descen-*

^a 8 Ed. 3. 381. ^{*} 13 Ed. 3. Fitz. Entry 57. Co. Litt. 5. b. F. N. B. 191. h. ^b 26 H. 8. 3. ^c Dyer, 114. b. ^d 13 H. 8. 16. ^e 19 H. 6. 32. b. Bro. Explees, 4. ^f 21 H. 6. 22. Bro. Explees, 5. 11. ^g 9 H. 6. 53. Bro. Explees, 1. 50 Ed. 3. 10. Bro. ibid. 3.

der, and shall not make mention of the Tenant for Life, and therefore the Esplees shall be only laid in the Tenant in Tail; otherwise it is in such Case of a Reversion in Tail granted. The Form is, and *wherefore he says, that he was seized of, &c. in his Demesne as of Fee and Right, in Time of Peace, in the Time of the Lord the now King, taking thereof Esplees, to the Value, &c.*

In all Actions Real, as *Formedon^h in Descender* brought by one, or a *Writ of Error* brought against one (where the Ancestor recovered, but not where he comes in by his own Wrong) if the Tenant be within Age, and in by Descent, the Parol shall demur until his full Age; so also ^k where the Demandant is within Age, that is to say, in every Action *Auncestral Droitrel* of the Seizin of his Ancestor (as in a Writ of Right of the Seizin of his Ancestor) or in an Action *Auncestral Possessory, Aiel, Besaiel, Cofinage*, or the like, when the Tenant pleads a Feoffment, &c. of the Ancestors in Bar, which makes it equal to the Action *Auncestral Droitrel*; But in an Action of his own Possession, the Parol shall never demurr for Nonage of the Demandant: in a *Formedon in Descender* by an Infant, if the Tenant pleads Warranty with Affets against him, the Parol shall demur for if he traverse the Affets, the Deed of Warranty shall be acknowledged: ^l but if the Tenant pleads a Recovery in Avoidance of the Estate Tail, the Parol shall not demur, [80] for there the Court shall plead for him; but the Parol shall not demur in a Writ of *Entry sur Disseizin* by an Infant, altho' the Tenant plead a Matter in Deed, as a Feoffment with Warranty by the Ancestor of the Infant, for there the Infant claims of his own Possession ^m. And if the Infant and Ancestor be Jointenants in Fee, and the Infant survive, in a *Præcipe quod reddat* against the Infant, he shall not have his Age ⁿ.

^h 48 Ed. 3. 33. Vide 6 Co. 3. b. ⁱ 9 H. 6. 46. Fitz. Age, 16. ^k Dyer, 137. pl. 22. ^l 48 Ed. 3. 33. ^m 12 Ed. 4. 17. F. Age, 18. 6 Co. 3. b. Dy. 137. pl. 24. ⁿ 48 Ed. 3. 35.

THE THIRD BOOK

The Entry is, *And the aforesaid C. says, that he is within the Age of 21 Years, and doth not intend that, during his Mincrity, the aforesaid A. ought to be answered touching the Tenement aforesaid, with the Appurtenances, &c. And prays the Plaintiff aforesaid thereof, may remain until the Age of the aforesaid C. and because the aforesaid A. this doth not deny, therefore let the Plaintiff aforesaid remain until the Age of the aforesaid C.*

Statutes.

Westminster 1. cap. 47. *In a Writ of Entry of a Disseizin to the Ancestor freshly done, the Parol shall not demur for the Nonage of the Heir of the Disseizor, or Disseizee.*

Gloucester, cap. 2. *In Cosnage, Aiel, Besaiel by an Infant, and a Feoffment or other Thing pleaded to the Inquest, the Inquest shall pass as if he was of full Age.*

Westminster 2. cap. 40. *In a Cui in Vita by the Feme or the Heir of the Alienation of the Husband, the Parol shall not demur for Nonage of the Heir, who ought to Warrant.*

The View shall be here of the Thing in Demand, or of the Land whereout it issues, when the View is so necessary, that without it the Tenant may not well answer^m. The Viewⁿ shall be demanded before any Plea in Bar, and may be after a Plea to the Writ; for altho^a a Man pleads a Plea which goes to the Action (as that the Demandant in a Writ of Dower is an Alien born) yet if he conclude to the Writ, he shall have it afterwards. The Entry is, *And the aforesaid A. comes and prays the View of the Tenements aforesaid, with the Appurtenances, and bath it, &c. and Day thereof here is given to the Parties aforesaid, until, &c.*

The Form of the Writ to have View is, *The King to the Sberiff, Greeting; We command you, that without delay, you cause S. to have View of one Messuage, &c.*

Statutes.

Westminster 2. cap. 48. *View shall not be granted, but where it is necessary, viz. after losing by Default, or*

^m Vide Westm. 2. cap. 48.

ⁿ 3 H. 6. 55.

by Plea in Abatement; it shall not be had in a second Writ where he had it in the first; nor in a Writ of Dower against the Alienee of the Husband, or the Heir of the Alienee; nor in a Writ of Entry, where he had it in a former Writ of Entry, which was abated by Misnomer of Entry; nor in a Writ of Entry upon a Demise made to the Tenant himself by the Demandant or his Ancestors being within Age, of unsound Memory, in Prison, or the like; but upon such Demise made to the Ancestor of the Tenant, the View lies. [b]

18 Ed. 2. Stat. de visu terræ. The View shall not be had in a Writ of Ward, of Customs and Services, of Advowson (unless where there are more Churches in one Town named after the same Saint) in Dower, and Nuper obiit.

If the Tenant be but Tenant for Life, he may pray in Aid of him who hath the Inheritance; and therefore here the Tenant himself remains always Party, and is never out of Court: He is allowed to pray in Aid for the Weakness of his Estate. The Entry is, And now here at this Day comes, &c. and the same E. says, (and conveys to him an Estate for Life) and so the same E. says, that he hath nothing in the Manor aforesaid with the Appurtenances, but for Term of his Life only, the Remainder thereof to the aforesaid S. and his Heirs belonging, without which said S. the same E. says, that he cannot answer in Form aforesaid, nor the aforesaid Manor draw into Plea, and prays of him the said S. and it is granted to him. Therefore it is commanded to the Sheriff, that he summon by good Summoners the aforesaid S. that he be on such a Day, &c. to answer the aforesaid T. together with the aforesaid E. of the Plea aforesaid, if, &c. [18]

The Tenant who hath the Warranty may vouch, that is to say, call in him who ought to warrant (for so is the Entry, *vocatus ad Warrantiam A*, &c.) to answer to the Action: And therefore ^p when the Vouchee enters

PREROGATIVE.

The King shall not be vouch- ed, because Voucher is in lieu of Action, and no Action lies against the King, but Aid shall be had of him, which in this Case hath the force of Voucher; as if the King by his Letters Patent give Land to one by this Word *Dedi*, the Patentee shall have Aid of him, for

^o 31 Ed. 3. Fitz. Joinder in Aid, 10. Ed. 3. F. Joinder in Aid, 10.

33 H. 6. 19.

^p 31

for that by the same Word he may vouch a common Person, 15 H. 7. 10. And when one prays in Aid of the King in lieu of Voucher, the special Cause ought to be entered, or he shall never have in Value by Petition, 9 H. 6. 4. The Entry in *Aid-Prayer* of him is, *And the same C. says,* (and conveys to him, an Estate for Life of the Grant of the King, or the like) *and so that he holdeth for Life, the Reversion to the King; and prays Aid of the Lord the King, &c. and bath it. And thereupon Day is given, as will, &c. And it is ordered the same (Demandant) that in the mean time he follow under the Lord the King.*

Statutes.

De Bigamis, cap. 1. Upon such Feoffment or Charter where another Person was bound to warranty, the Justices shall surcease.

Cap. 2. Not upon Confirmation or Grant of the King, or by Charter without Clause of Warranty.

Cap. 3. Not in Dower against the Guardian who hath the Custody of the Grant of the King, altho' the Guardian vouch the Heir.

[81] entered after the Death of him of whose Seizin he demands, except the Vouchee be ready; who if he vouch over, the Demandant shall have this Counterplea.

Also in a Writ of Entry in the Degrees, none shall vouch out of the Line.

Also in a Writ of Right, or in Writs of Possession as before, it is a good Counterplea, viz. that the Vouchee nor his Ancestors, had never Seizin of the Land, nor any thing in the Services by the Hands of the Tenant or his Ancestors, since the Time of him on whose Seizin the Demandant declareth, unto the Writ purchased, whereby he might make a Feoffment; if that the Vouchee be not present, who if he vouch over, the Demandant shall have this Counterplea. But Warranty of Charters lies in these Cases.

20 Ed. 1. De vocat. ad Warrant. Counterplea of Voucher, viz. that the Vouchee nor any of his Ancestors never had any thing whereby he might make a Feoffment

9 F. N. B. 134. k.

enters into the Warranty, the Tenant is out of Court; and, notwithstanding a Recovery be had in a *Warrantia Chartæ* before, yet if he be afterwards impleaded in an Action where Voucher lies, there he shall vouch him against whom he so recovered; else he should not have Benefit of such Recovery.

Statutes.

Westminster 1. cap. 40. In Mortdancestor, or the like Writs of Possession, Nuper obiit, Intrusion, or the like Writs, in which Land is demanded, which ought to descend, revert, remain, or escheat, after the Death of any Ancestor, or otherwise, if the Tenant vouch, it is a good Counterplea, viz. that the Tenant or his Ancestors was the first who

with

with Warranty, shall be received, altho' the Vouchee be ready to enter into Warranty.

14 Ed. 3. cap. 18. The Demandant may have Counterplea that the Vouchee is dead, or that there is none such.

Westminster 2. cap. 6. Upon Counterplea of Warranty found against the Vouchee, he shall lose the Land.

If the Vouchee lose, the Tenant shall recover so much in Value against him; and therefore * Voucher is in lieu of an Action; where the original Process is *Summons ad warrantizandum*, (or, if one be vouched within Age, *Summons ad habendum visum* first, and if he be awarded of full Age, then *Summons ad warrantizandum*, if within Age, the Parol shall demur) and *Grand Cape ad valentiam*.

If the first Process, *Summons ad warrantizandum*, or *Habere facias visum* where he is vouched within Age, the *Alias* and *Pluries* be not served, then ^a shall issue a *Sequatur sub suo periculo*. The Entry at the Pluries is, *And it is ordered the Attorney of the aforesaid A. (the Tenant) that he follow under his Peril, &c.* And if the Tenant do not procure this to be served, he shall lose his Warranty; for it is at the Peril of the Tenant. If ^b upon vouching the Heir, the *Sequatur sub suo periculo* be returned *Nothing in Land by Descent, but that he was summoned in the Land which he hath by Purchase*, the Tenant shall lose his Warranty, for the Summons ought to be in the Land descended. But if ^c the *Sequatur sub suo periculo* be returned *served*, there the Tenant shall recover in Value.

^d In *Voucher* upon Warranty, the Recovery in Value shall be of the Hereditaments which the Vouchee hath at the Time of the *Voucher* only. So ^e that if a

* Co. Litt. 102. a. 5 Co. 17. a. Old N. B. 179. b. Co. Litt. 101. b. 393. 45 Ed. 3. 23. 14 H. 6. 7. Bro. sequat. sub. &c. 3. Post. 86. a. 14 H. 6. 20. Old N. B. in sequat. sub. &c. the Writ shall issue if he do not come at the Plur. and vid. Rast. Entr. tit. Voucher that at the Pluries it is always ordered the Attorney or the Tenant himself, quod sequatur, &c. 13 Ed. 3. Fitz. Judgment, 170. 3 H. 7. 13. Bro. Recov. in Val. 40. 22 H. 6. 22. F. N. B. 134. k. 5 Ed. 3. Fitz. Dower, 129.

Man having a Wife lose in Value by *Voucher*, the Feme shall be endowed by the Priority of her Title. In Exchange, the Recovery shall be from the Time of the Exchange.

Coparceners shall not vouch, but shall pray in Aid of one another, which hath the Force of *Voucher*. And there the Hereditaments are liable for them to recover *pro rata* from the Time of the Death of their Ancestor; ^a and if two Coparceners make Partition, the one aliens her Part, and afterwards the other is impleaded and prays in Aid, she shall recover *pro rata* of that which she lost, not of that which remains in the Hands of the other.

The Tenant may also here plead a Warranty in Bar, where he who ought to warrant brings the Action. ^b As if there be Grandfather, Father, and Son, the Grandfather is disseized, the Father releases to the Disseizor with Warranty, and dies, afterwards the Grandfather dies; now if the Son bring an Action to recover the Land, he shall be barred by the Warranty made by his Father; and this is called a *Rebutter*. The Form is as in every other Plea in Bar.

Statutes.

Gloucester cap. 3. *The Son shall not be barred of the Inheritance of his Mother, by the Warranty of the Father Tenant by the Curtesy, nor by his Alienation in the Life of the Mother, whereof no Fine is levied, if Assets do not descend, but such Son shall have a Maridancestor. And if Assets afterwards descend to him from the Father, the other shall have a Scire facias for Recovery of the Land aliened.*

Altho' the Tenant of the Land be a Stranger to the Warranty as a Disseizor, he who comes in by Recovery, or the like, he may plead that he hath the Estate of another, and rebutt; but not vouch by a Warranty made to such Person ⁱ.

[82] ^{*} A Warranty made by a Disseizor at the Time of the Disseizin, is called a Warranty which commences by

^a Perk. 61 h. ^{*} 1 Ed. 3. 4. ^b Littlel. §. 706. ⁱ 31 H.

8. Bro. Que Estate. 48. 42 Ed. 3. 19. ^{*} Littlel. §. 697.

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Disseizin; as ^a where the Father, or other Ancestor, who hath nothing but a Lease for Years, or at Will of the Demise of his Son, or as ^b Guardian to him in Chivalry or in Socage, makes a Feoffment with Warranty, or if he ^c who hath no Right enters into the Land, and incontinently makes a Feoffment with Warranty, this is no Bar to the Heir; for then ^d his Action and Right should be lost for ever. But by ^e such Warranty a Man may be vouched; for this is in nature of a Covenant against him as Heir to his Ancestor; and if he hath other Land descended to him by the same Ancestor, it is Reason that he warrant all that he may do, saving to him his Action that he may have by reason of the Disseizin.

If Judgment in a real Action (for ^f in personal Actions Debt only lies after the Year, which is a new Original, until *Westminster 2. cap. 45.* gave a *Scire facias*) be not executed within the Year, after the Year he is put to a *Scire facias*, to warn the Defendant to shew Cause wherefore he should not have Execution. The Form is, *Whereas M. who was the Wife of J. in the Court of the Lord E. late King of England our Grandfather at Westminster, that is to wit, in eight Days, &c. before R. B. and his Companions then Justices, &c. did by Consideration of the same Court recover her Seizin against R. N. and R. of the third Part of one Messuage, &c. as of the Dower of her the said M. of the Gift of the aforesaid J. her late Husband, as by the Inspection of the Rolls and Records from the Time of our aforesaid Grandfather to us appeareth, nevertheless Execution of the Judgment aforesaid yet remaineth to be done, as we have understood by the Insinuation of her the said J. And because we are willing that those Things which are rightly done in the said Court be duly executed, we command you, that by good and lawful Men, &c. you make known to the aforesaid R. N. and R. that they be before our Justices at Westminster on, &c. to shew if they have or can say any thing for themselves, wherefore Execution of the Judgment aforesaid*

^a Littlel. §. 698.

^b Ibid. §. 699.

^c Ibid. §. 702.

^d 50 Ed. 3. 12. b.

^e Ibid.

^f Ante, 76. b. Post. 101. b.

Old N. B. 163. b. 3 Co. 12. a. 5 Co. 88. a.

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THE THIRD BOOK

should not be done, if to them it so seemeth meet: And have, &c.

And this *Scire facias* is as a new Action: And therefore the Defendant may here plead any Matter that happens after the Judgment given to oust him of his Execution, as Outlawry, &c. or a Release of all Actions; for inasmuch as he shall plead hereupon, the *Scire facias* may well be called an Action, altho' it be but a Writ of Execution. But notwithstanding a Man that recovers Debt or Damages, releases to the Defendant all Actions, yet he may well sue Execution by a *Fieri facias*, *Capias ad satisfaciendum*, &c. for such may not be called Actions.

Upon a *Nihil* ² returned, Execution shall presently be had against the ¹ Parties to the first Judgment, but not against Executors or Administrators, nor in a *Scire facias* upon Recognizance, or a Charter of Pardon where he is outlawed, or the like, or to ¹ repeal a Patent; for in all these Cases two *Nibils* shall be first returned: For which Reason a *Scire facias sicut alias* shall there issue. And in this Writ of *Scire facias*, the ² Solemnities of *Summons*, *Attachment*, *Essoign*, *View of Land*, &c. do not lie.

[b]

Statutes.

Westminster 2. cap. 45. *Things recorded before the King's Justices, or contained in Fines (whether Contracts, Covenants, Obligations, Services, Customs that are known) shall be executed within the Year without pleading.*

After the Year shall issue a Scire facias, and upon Default Execution shall be.

In the same Manner shall be done touching the Mesne who by his own Acknowledgment or Judgment is bound to Acquittal.

Upon Recovery ¹ in any real Action, altho' it be by Default, there was no Remedy at the Common Law but by a Writ of Right, so that Tenant in Tail, Tenant

² 8 Ed. 4. 15. b. Dy. 167. 19 H. 8. 6. Upon *Nihil* in a *Scire facias*, upon Recovery in Accompt, a *Capias ad computandum* shall issue, 22 H. 6. 41. b. Upon *Nihil* returned on the first Distress, upon Recovery in Detinue Execution shall be had, 5 H. 7. 3. 24 H. 8. Bro. Perempt. 63. ¹ Dyer ibid. ¹ 26 H. 8. per Dy. 198. a. ² Westm. 2. c. 45. so recites it. ¹ Recital in Stat. Westm. 2. c. 4.

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by the Curtesy, in Dower, or for Life, (of which Estates a Man should not have a Writ of Right), were without Remedy; and also the ^m Wife was put to a Writ of Right upon a Recovery against the Husband and her. To remedy which Cases, were made,

Statutes.

Westminster 2. cap. 4. *Tenant in Dower for Life, or in Tail, who lose by Default, shall have a Quod ei deforceat, in which he shall vouch as if he were Tenant.*

Westminster 2. cap. 3. *A Woman shall have a Cui in vita after the Death of her Husband upon Recovery by Default against the Husband and her. Also upon Default or Reddition of the Husband, if she come before Judgment, and be ready to answer and defend her Right, she shall be received. Also upon Default or Reddition of Tenant in Dower, by the Curtesy for Life, or Tenant in Tail after Possibility, he in the Reversion shall be received to answer, if he come before Judgment. Upon Judgment given by Default or Reddition, he shall have a Writ of Entry after the Death of the Tenant.*

Vide 20 Ed. 1. De Defensione Juris. *He that cometh in by collateral Title, that is to say, he in the Reversion, upon Receipt shall find Surety (as the Court shall award) to answer the Value of the Land, from the Day of his being received until Judgment, if it pass for the Demandant.*

13 Rich. 2. cap. 17. *He in Reversion shall be received upon faint pleading of Tenant for Life, and he shall plead in chief without Delay. Day of Grace shall be given between them, not the common Day in Plea of Land.*

Surety of Issues shall be found, as well where Receipt is counterpleaded, as where it is granted. [83]

Gloucester, cap. 11. *Tenant for Years shall be received before Judgment given to say that the Action was brought by Covin.*

21 H. 8. cap. 15. *Lessee for Years, Tenant by Statute, Staple, Merchant, or Elegit, and he who is intitled to have Execution of Land by a Statute, may falsify upon feigned Recoveries for their Land only. Also the Recoverors shall avow, shall have Waste, and Debt for the Rent against such Termors.*

In every such Action by which Land is demanded,

^m Recital in Stat. Westm. 2. c. 3.

or

or by which Land is to be charged or bound, or which in any sort concerns Land, as in a *Writ of Mesne, Warranty of Charters, Writ of Customs and Services*, and the like, a Fine may be levied by Accord of the Partiesⁿ.

A Fine is an Acknowledgment in the King's Court, that the Land, or the like, is the Right of him who complains thereof. He that complains is called the Plaintiff, and the other the Deforçant. If the Fine supposes a Gift precedent, then it is called a *Fine sur Conusance de Droit come ceo qu'il ad de son done*. The Form of the Fine is thus, *This is the final Concord made in the Court of the Lord the King, &c. whereof a Plea of Covenant depends in the same Court, that is to say, that the aforesaid J. S. hath acknowledged the Tenements aforesaid to be the Right of the said A. &c.* A Fine may be levied upon a Writ of Warranty of Charters, for it is but in effect a Covenant between the Parties before the Justices, and entered of Record, and before the Statute of *Westminster de his quæ concordata sunt*, which gives a *Scire facias*; if the Fine was not executed, the Party should have a Writ de *fine fracto*, and should recover Damages only; which proves that a Fine is but a Covenant of Record^a.

Here one of them ought of necessity to have such an Estate at the Time of the Fine levied; for^b against the Plea, that the Parties to the Fine had nothing, &c. it is not a good Replication, that the Parties were seized, &c. for^c if one of them was seized, it is sufficient: Which Form of Pleading, *viz.* that one of the Parties was seized, proves, that if it be but an Estate for Years, the Fine is void. ^d And by a Fine of the Land itself the Reversion dependant upon an Estate for Life passes. And^e the Fine countervails a Feoffment, for it is as a Livery of Record; so that a Freehold^f shall pass hereby without any Livery of Seizin.

ⁿ 5 Co. 39. a. 2 Inst. 513.

^b 22 H. 6. 57.

^c 27 H. 8. 4.

^a 42 Ed. 3. 5. 40 Ed. 3. 7.

^d 37 H. 6. 5.

^e Plowd.

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^f Little. §. 59. says, Upon a Feoffment made in Pais where a Freehold shall pass, be it by Deed, or without Deed, it behoveth to have Livery of Seizin. Which Words (in Pais) are put to exclude Fines which are Feoffments of Record.

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That whereof the Fine is levied, or any thing contained in the same, as ^b Rent, Common, Estate ^a for Years, or the like, ⁱ may be regranted to the Conusor by the same Fine; and this is called a Fine *sur Grant and Render*; the Form of which is, *And for this Acknowledgment, &c. the Conussee hath granted to the Conusor the Tenements aforesaid with the Appurtenances, and them to him hath rendred in the same Court, to have to the Conusor, &c.* for none shall take the first Estate, but those who are named in the Writ of Covenant; as where A. levies a Fine to B. who renders it to A. and E. his Wife, &c. In this Case E. hath not thereby any Estate, for she was not Party to the Writ. ⁱ But every Stranger may take a Remainder. [b]

The Chief Justice of the Common Pleas may take the Conusance of a Fine out of Court, and it shall be recorded there afterwards, so may not any other Judge; but a Justice of Assize by a general Patent with Clause of *Non obstante*, may*.

A Fine executed binds all Persons if Claim be not made within a Year^k; and therefore it is called a *Fine, quia Finis finem litibus imponebat*. And in a Fine *sur render*, if the Conussee do not sue Execution within the Year, but after the Year by a *Scire facias*, it is not necessary for any Stranger to put in his Claim^l.

Prerogative.

The King may give Power to any other by Writ, ^m which is called *Dedimus potestatem de Fine levando*, to take such Conusance, that is to say, upon Infirmary, or the like, in the Party who ought to levy the Fine, who is not able to travel to Court; for every such *Dedimus potestatem* supposes a Writ of Covenant, or the like depending: And they, to whom this Writ is directed, ought to go in proper Person to the Party to take the Conusance; which being certified to the King's Justices in the Common Pleas, shall be ingrossedⁿ.

^g 18 Ed. 4. 22. ^b 36 H. 8. Bro. Fines, 118. ⁱ 30
H. 8. Bro. Fines, 108. 24 Ed. 3. 28, b. & 57. b. & Bro. Fines,
61. 2 Inst. 514. S. P. * 1 H. 7. 9. ^k At the Common
Law. ^l 7 Ed. 3. 37. F. Contin. Claim 7. ^m F. N. B.
146. g. Old N. B. 103, ⁿ 1 H. 7. 9.

A Feme Covert, who joins with her Husband in a Fine, shall be bound for ever.

Therefore the Justices ought to examine her, and see if she doth it voluntarily. For if she saith, upon Examination, that her Husband compells her by Imprisonment, or the like, to levy the Fine, such Fine shall not be received °.

Statutes.

18 Ed. 1. Modus levandi Fines. See there the Manner of levying Fines, and that a Fine may not be levied by Law without Writ original.

27 Ed. 3. cap. 1. Stat. 1. De Finibus levatis, ousts the Averment in annulling of a Fine (viz.) that the Plaintiff or his Ancestors were all the Time (before, at the Time, and after the Fine) seized of the Land.

15 Ed. 2. Stat. Carlisle. He that levies a Fine shall appear in Person, to the intent that his Age, Ideocy, or other Defect, may be discerned by the Judges. But upon Impotency that he cannot come into Court, two or three of the Justices shall go to him, and take his Conusance. If only one goes, he shall take with him a Knight, and shall certify the same into the Bench of Record, to the intent that, all Things incident to the Fine being examined by them, the Fine may be levied.

[84] 5 H. 4. cap. 14. The Writ of Covenant, or the like, whereupon the Fine is levied, the Dedimus potestatem with the Conusances and Notes of the same, before that they are drawn out of the common Bench by the Chirographer, shall be inrolled in a Roll to be of Record for ever, to tarry in the safe Custody of the chief Clerk of the Common Bench, to the end that, if the Notes or Fines be embezelled, a Man may have recourse to the said Roll, to have thereof Execution.

23 Eliz. cap. 3. Vide infra in Writ of Error.

34 Ed. 3. cap. 16. ousts the Plea of Non-claim in Fines.

1 Rich. 3. cap. 7. Who shall be bound by a Fine after the engrossing and Proclamations. See the Statute somewhat to the same effect, with the Statute ensuing of 4 H. 7. But now regard the said Statute 4 H. 7.

• 2 Inst. 515. 15 Ed. 4. 1. b.

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4 H. 7. cap. 24. Every Time after engrossing shall be read and proclaimed in Court, the same Term, and the three Terms next following, at four several Days each Term; all Pleas shall cease in the reading and proclaiming.

The Proclamations being made, the Fine shall conclude as well Privies as Strangers.

Except Femes Covert (other than Parties to the Fine) and every other being within Twenty one Years, in Prison, or out of the Realm, or of unsound Memory at the Time of the Fine, not Parties to the Fine.

Saving to every one and their Heirs (other than Parties to the Fine) such Right, Title, Claim, and Interest, as they had at the Time of the Fine, so that they pursue the same by Action or lawful Entry within five Years after the Proclamations^p.

And saving to all other Persons such Action, Right, Title, Claim, and Interest, as shall first accrue, remain, descend, or come to them after the Proclamations, by force of any Gift in Tail, or by any other Cause or Matter had or done before the Fine levied; so that they take their Right and Title according to Law within five Years after such Action, &c. accrued, &c. or if at the Time of the Action, &c. accrued, &c. they be Covert Baron, &c. then they and their Heirs shall have five Years after such Imperfections removed. [b]

Saving to all Persons not Parties nor Privies to the Fine the Exception, that the Parties to the Fine, nor any to their Use, have not any thing.

32 H. 8. cap. 36. All Fines with Proclamation, according to the 4 H. 7. by any Person of Twenty one Years of Age, of any Land, &c. before the Fine levied entailed to him who levies the Fine, or his Ancestors in Possession, Reversion, Remainder, or Use, immediately after Proclamation, shall be a Bar against him and his Heirs claiming only by force of any such Entail, and against all others claiming only to the Use of him or any Heir of his Body.

This shall not extend to a Fine of Land given in Tail by the King or by Parliament, the King being in Reversion at the Time of the Fine.

^p Vide 4. Anne, cap. 16. sect. 15.

1 Mar. cap. 7. Sess. 2. *Notwithstanding no Proclamation be made by reason of Adjournment of Term, the Fine shall be as good as if Proclamations had been made, according to 4 H. 7.*

31 Eliz. cap. 2. *Proclamations of Fines shall be made but four Times, that is to say, once in the same Term in which it is engrossed, and once each of the three Terms next following.*

A Grant by Fine of a *Seignior, Rent-charge, Rent-seck, Remainder, or Reversion*, is presently good. ^a But in order to enable him to bring such Actions as run in Privy between the Tenant and him (as *Action of Waste*, or *consimili casu*, when Reversion of Tenant for Life is granted by Fine, and afterwards Tenant for Life does waste or Aliens in Fee, *Writ of Escheat* or *Ward*, when the Services of the Tenant are granted by Fine, and afterwards the Tenant dies without Heir, or his Heir being within Age) in such Case it is not good ^r without Attornment: But he shall enter for Forfeiture of Tenant for Life, shall be received upon his Default, shall enter for Escheat, seize the Ward, &c. without Attornment ^s.

[85] Before the Fine be engrossed, he shall have these three Writs following (all Indicial, issuing out of Record) to compell the Tenant to attorn; the Process is *Summons* and *Distress infinite* ^t.

Per quæ Servitia, ^u when the Fine is levied of a Seignior. The Form is, *We command you, that you distrain A. by all his Lands, &c. and that of the Profits, &c. and that you have his Body (on such a Day) to acknowledge by what Services he holds one Messuage with the Appurtenances in B. which J. of F. in our Court granted to R. by Fine thereof between them made, and to bear, &c.*

^w *Quem redditum reddit*, when it is of a Rent Charge, or Rent seck. The Form is, *We command you, that you distrain, &c. (ut supra) to acknowledge what Rent he yields for the Issues of one Messuage, &c. which J. of F. in our Court, &c. hath granted to R. S. by Fine, &c. (ut supra.)*

^a 48 Ed. 3. 15. b.

^r Vid. 4 Anne, c. 16.

^s 37 H. 6.

5. ^t Old N. B. 171.

^u Old N. B. 170.

^w Ibid.

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Quid juris clamat^{*}, when it is of a Remainder or Reversion. The Form is, *We command you, that you distrain, &c. (as above) to acknowledge what Right he claims in one Messuage, &c. which J. of F. in our Court, &c. hath granted to R. S. by Fine, &c. (as above.)*

CHAP. V.

Of Pleas of Land.

REAL Actions are either *meerly Real*, or *mixt*. *Meerly Real*, in which only the Thing itself, that is to say, the Freehold or Inheritance shall be recovered, but not Damages. For at the Common Law, Damages should not be recovered, but in *Personal* and *mixed* Actions, and not in *Real*, viz. *Dower*, *Writ of Entry sur Disseizin*, *Aiel*, *Cofinage*, &c. for therein Damages are given especial Statutes[†].

And they are meerly Real, which are properly called Pleas of Land, or in the Realty.

Pleas of Land which demand a Freehold [in Demesne;

These do not lie but against the Tenant of a Freehold in Deed or in Law, and therefore a^a Release of [b] all Actions Real is no Plea, except that he was Tenant of the Freehold at the Time of the Release, for otherwise, he that did release had not any Cause of such Action against him. And^b such Action is not maintainable against Lessee for Years, for he hath not the Freehold. Neither shall the^c Disseizee have a *Præcipe quod reddat* against the Disseizor, who is Pernor of the Profits for Years only, notwithstanding the Statute, because by the Common Law, Action does not lie against him. And for this Reason^d, Non Tenure of the whole, or although it be but of Parcel of the Thing demanded^e Jointenancy with another not named in the Writ^f, Entire Tenancy of the whole, or^g se-

^{*} Old N. B. 170. b.

[†] Bro. Colts, 29.

^a Littlet. §.

495. 8 Co. 151. b.

^b Old Tenures ad. v. Term d'Ans.

^c Plowd. 87.

^d 4 Ed.

4. 32. b.

^e 19 H. 6. 32. b.

22 H. 6. 12.

^f 45 Ed. 3. 5.

^g 37 H. 6. 8.

27 H. 8. 30.

veral Tenancy of Parcel, when the Writ is brought against two or more, are good Pleas in Abatement of the Writ.

^a But with him may be joined the Mortgagor, Lord of a Villain, or the like, who hath Title to enter; but not the Disseizee with his Disseizor.

Statutes.

25 Ed. 3. cap. 16. *By Exception of Non Tenure of Parcel, no Writ shall be abated, but for the Quantity of Nontenure, which is alledged.*

37 Ed. 3. cap. 17. *No Writ shall be abated by Exception of Acknowledgement of Villenage, if the Demandant will aver, that he, who alledged the Exception was free the Day of the Writ purchased.*

1 Rich. 2. cap. 9. *The Disseizee shall have his Recovery, viz. of the Land, and double Damages, against the Disseizor, who makes a Feoffment by fraud, and takes the Profits, if he commence his Suit within a Year after the Disseizinⁱ.*

4 H. 4. cap. 7. *The Disseizee shall have Action against the Disseizor, being Pernor, during the Life of the Disseizor; and other Actions of Pleas of Land to be brought against the Pernor, within a Year after the Action accrued.*

11 H. 6. cap. 3. *Inasmuch as the said Statute 4 H. 4. according to the Opinion of some, is intended in Affize of Novel Disseizin only, the Statute doth also extend to all Writs founded upon a Disseizin.*

1 H. 7. cap. 1. *A Formedon is given against the Pernor.*

34 H. 8. cap. 20. *A Feigned Recovery by Assent of the Party against Tenant in Tail, of the Gift or Provision of the King, where the King is in Reversion, or Remainder, shall be void against the Heir, be the Recovery with Voucher or not.*

[86] 14 Eliz. cap. 8. *Every fraudulent Recovery, and Recovery by Agreement, against any Tenant for Life, or in which any Tenant for Life is vouched, or in which he*

^a 41 Ed. 3. 16.

ⁱ Note, all Pernancy of Profits is now taken away by 27 H. 8. of Uses.

that hath Right to the Estate for Life is vouched, shall be void against him in Reversion, or Remainder. Provided, that if it be with the Assent of him in Reversion or Remainder, so that such Assent appear of Record, it shall be good.

Vide 23 Eliz. cap. 3. In Writ of Error.

Gloucester, cap. 13. From the Time that a Plea shall be moved by Writ, the Tenant shall have no Power to make Waste, or Estreperment of the Tenement, which is in demand, hanging the Plea; if he do, it shall be kept safe at the Suit of the Demandant.

^a The Original Process here is, *Summons* and *Grand Cape*.

Every Summons shall be by two ^b Summoners at least; and so shall it be, of the Tenant, in his Land, ^c but not of his Goods, nor by Rent Service, Rent Charge, Rent Seck, or Common, for there the Land belongs to another: The Form is, *Summon by good Summoners the aforesaid A. &c.*

^d In Voucher, shall be *Summons ad Warrantizandum*; The Form is, *Summon by good Summoners A. that he be before our Justices at Westminster, &c. to warrant to W. the Messuage with the Appurtenances in G. which J. in our Court before our Justices at Westminster, claims as his Right against him, and whereupon the same W. in our said Court, vouches the aforesaid A. to warranty.*

^e But if he be vouched as Heir within Age, *Summons ad habendum visum, alias, Pluries, and Sequatur sub suo periculo*, shall first issue.

^f The Summons upon Action against him as Heir, shall be in the Land which descends. Otherwise, in any Land whatever.

^g If it be to recover a Freehold in the Land, it shall be in the same Land. Otherwise, if he makes Default, he may at the *Grand Cape* wage his Law of *Non Summons*; but if he appear, 'tis not material in what Land he is summoned.

^a Old N. B. in fine.

^b 8 H. 6. 5. 35 H. 6. 46. b.

^c 32 H. 6. 11. 22 H. 6. 38. ^d Ante, 81. a. Old N. B. 179. b.

Co. Litt. 101. b. 393. a.

^e Ante, 81. a. 17 Ed. 3. 15.

^f 13 Ed. 3. Fitz. Judgment, 170.

^g 37 H. 6. 26.

THE THIRD BOOK

* *Grand Cape*, is a Process (where the Tenant makes Default at the Summons returned) to take the Land into the King's Hands, by the View of legal Men, who are called *Veiors*, the other *Pernors*, with a Summons of the Tenant to answer^h, as well to his Default as to the Action of the Demandant. This is the Reason that it is called a *Grand Cape*. Andⁱ therefore the Tenant may here save his Default, as to say, that he [b] was not summoned according to the Law of the Land, and of that he is ready to make his Law, or that he was in Prison, or hindered by fear of Water, &c.

* And the King shall have the Land to his own Use, whereof the Sheriff shall render Account, that is to say, of the Issues, from the Time of the Default until Judgment for the Demandant. The Form is, *Take into our Hand by the View of legal Men of your County, the third Part of one Messuage, with the Appurtenances in N. which J. held the 28th Day of November, in the Year &c. to whatsoever Hands they have come in your Bailiwick, which J. who was the Wife of J. in our Court, &c. at Westminster, claims for her Dower against the aforesaid J. for the Default of him the said J. and the Day of the taking you make known to our Justices at Westminster by your Letters sealed. And summon by good Summoners the aforesaid J. that he be before our Justices at Westminster in eight Days of St. Hillary, to answer thereto, and to shew why he was not before our Justices at Westminster, in eight Days of St. Michael, &c. as he was summoned; and have you there the Names of them by whose View you make this Summons, and this Writ.*

If the Tenant be returned summoned, where in Truth he was not summoned as he ought to be, he may thereof wage his Law, if he comes within forty Days after the *Grand Cape* returned, otherwise not, inasmuch as the Land is taken into the King's Hands; but the Party shall recover the Land presently, that is to say, at the Common Law; but now this is ousted

* Old N. B. 177. b. 50 Ed. 3. 16.

i Old N. B. *ibid.*

k S. amf. Præ. 34.

h 38 H. 6. 33.

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ⁱ 15 Ed
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by the Statute 9 Ed. 3. *infra*. And by this Wager of Law, the Writ shall abate¹. The Entry is, ^m *A. heretofore demanded against B. two Messuages, &c. so that it was then commanded to the Sheriff, that he summon the aforesaid B. by good Summoners, that he be here in eight Days, &c. to answer the aforesaid A. of the Plea aforesaid. At which Day B. made Default, so that it was commanded to the Sheriff, &c. that he should take the Messuages, &c. into the Hands of the Lord the King, &c. and that he summon B. by good Summoners, that he be here, to wit, &c. to answer the aforesaid A. as well of the principal Plea, as of the aforesaid Default; at which Day, &c. and the aforesaid A. precisely taketh himself to the Default aforesaid, which the aforesaid B. made here at the eight Days aforesaid, &c. And the aforesaid B. saith, that he never was summoned according to the Law of the Land, to be here at the aforesaid eight Days, to answer the aforesaid A. of the Plea aforesaid, and this he was ready to defend against him and his Suit, as the Court of the King here should consider. By which it was then considered, that he should wage his Law by 12, &c. and Pledges, &c.*

Statutes.

Magna Charta, cap. 28. *None shall be admitted to wage his Law, without credible Witnesses.*

In *Voucher* also there shall be a *Grand Cape ad Valentiam*, that is to say, to take in the same manner of the Land of the Vouchee, to the Value of the Land demandedⁿ. The Form is, *Take into our Hands by the View of legal Men of your County of the Land of A. for the Default of him the said A. to the Value of one Messuage, &c. which in our Court before our Justices at Westminster, &c. claims as his Right against R. and whereupon the same R. in our said Court vouched the aforesaid A. to warranty against him; and Day, &c. (all as in the Grand Cape above.)* [87]

¹ 15 Ed. 4. 7. Per Catesby.
417. a. pl. 1. 424. a. b. pl. 7.
191. b.

22 H. 6. 41.

^m Rast. Entr.

ⁿ Antie, 81. a. Co. Lit.

THE THIRD BOOK

• Upon Default herein, after Plea, Issue, or Demurrer, a *Petit Cape* shall issue: which is a Process to take the Land into the Hands of the King, with a Summons of the Tenant to hear his Judgment, that is to say, in regard of his Default, and not to answer to the Demand, as he shall do in the *Grand Cape*. And therefore this is called *Petit Cape*, and the other *Grand Cape*, for that it is less in the one than the other. The Form is, *Take into our Hands one Messuage, which R. in our Court before our Justices at Westminster, claims as his Right against M. for the Default of the said M. and summon by good Summoners the aforesaid M. that he be before our Justices at Westminster, in eight Days of St. Hillary, to hear thereof his Judgment.*

And upon *Voucher*, the *Petit Cape ad Valentiam* shall issue*. The Form is, *Take into our Hands of the Land of G. for the Default of the said G. to the Value of one Messuage, &c. which A. who was the Wife of C. in our Court before our Justices at Westminster, claims as her Dower against J. and J. in our said Court hath vouch-ed the aforesaid G. to warranty against her. And summon, &c. all as in the Petit Cape above.*

The Writ of Execution upon Recovery in these Actions is, *Habere Facias Seizinam*, to put him in Possession*. The Form is, *Know you, that A. in our Court &c. hath recovered her Seizin against B. of one Messuage, by the Default of the said B. (or as the Case is) and therefore we command you, that without delay you cause full Seizin to be given to the aforesaid A. of the Messuage aforesaid, with the Appurtenances.*

Statutes.

Articuli super Chartas, cap. 15. *Summons and Attachments in Plea of Land shall contain the Term of 15 Days at least, if it be not in Attachment of Assizes taken in the King's Bench, or before Justices in Eyre.*

31 Eliz. cap. 3. *After every Summons upon the Land in Real Actions, 14 Days before the Day of Return, Proclamation shall be made upon a Sunday, immediately after*

* 38 H. 6. 33.
• Old N. B. 179.

8 Ed. 4. 4.
• F. N. B. 167.

• 38 H. 6. 33.

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Divine Service and Sermon, if any Sermon be there, and if there be no Sermon, then immediately after Divine Service, at, or near the most usual Door of the Church or Chapel of the same Town or Parish, where the Land upon which the Summons was made lies; and this Proclamation shall be returned with the Name of the Summoners, otherwise no Grand Cape shall issue, but an Alias or Pluries Summons. [b]

9 Ed. 3. cap. 2. None shall lose his Land by Reason of Nonplevin^t.

Pleas of Land, either demand Land, or the like, in certain, by Writ of *Præcipe quod reddat*, or they are such as do not contain any such express Demand in the Writ^u.

^w A *Præcipe quod reddat* of Land, lies always in a Town or Place known out, &c. not in a Hamlet; but (Personal Actions, as Trespass, or the like, may be in a Hamlet.) So a^a Writ of Dower, or Affize, for there no Land in certain is demanded, and also in Affize, he shall recover by View of Jurors; same Law in a *Scire Facias* out of a Fine, *Nuper Obiit*, ^b Writ of *Mesne Covenant*, ^c Waste, ^d *Quare Impedit*, that is to say, these may be in a Hamlet. Otherwise it is of a Writ of Right of Advowson.

The ^e Writs of *Præcipe quod reddat*, are in the Right, or *Auncestrals Possessory*; those in the Right, either demand the Right itself, or are mixed in the Right.

The Right itself, as *Præcipe in Capite*, and Writs of Right in their Nature.

^f *Præcipe in Capite*, is for the meer Right (and therefore it lies only for Tenant in Fee Simple) of Land holden in Chief. The Form is, Command A. that he justly render to B. one Messuage, &c. which he claims to be his Right and Inheritance, and to hold of us in Chief,

^t 15 Ed. 4. 7. Per Catesby. ^u 34 H. 6. 33. b. ^w 9 Ed. 4. 36. 8 Ed. 4. 6. b. 34 H. 6. 18. b. ^a 18 Ed. 2. Fitz. Brief, 829. 29 Aff. pl. 33. 2 Inst. 263. ^b 6 Ed. 2. Fitz. Brief. 804. ^c 17 Ed. 3. 58. b. ^d 18 Ed. 3. 11. ^e 18 Ed. 4. 23. b. 34 H. 6. 4. Dyer, 137. ^f F. N. B. 5. f.

and whereof he complains, that the aforesaid A. hath unjustly deforced him. And unless, &c.

Statutes.

Vide Magna Charta, cap. 24. *This Writ shall not be granted of any Freehold, whereof a Freeman shall lose his Court.*

[88] * If the Tenant cast an *Essoign de Malo Lēti*, he may have a Writ of *Essoign de Malo Lēti* out of Chancery, to warrant the same, by which it shall be commanded to four Knights to see him, and if he be Sick, then to give him Day to the end of a Year and a Day, for in this *Essoign* is an Adjournment for so long Time. The Form is, *Send four lawful Knights of your County unto D. of M. to see whether or no he be Sick of the Disease for which he hath essoigned himself of being Sick in Bed against C. of D. in such a Suit, (naming it) and if he be Sick, then let them appoint to him a Day, from the Day of their View unto one Year and a Day, that he may then be (at the said Court) to answer thereof the aforesaid C. or put for him a sufficient Sponser; and if he be not sick, then let them put him a Day from the Day of their View in 15 Days, that he may then be (at the same Court) to answer thereof the aforesaid C. and order the four Knights, who shall be present at the View, that they be then there to testify their View, and what Day they have given him.*

Statutes.

See Westminster 2. cap. 17. *Supra in Essoigns.*

^b In this Writ the Tenant may not traverse the Seizin, but shall tender the Demy Mark to the King to have it enquired by the Jury; and if it be found, that the Demandant was not seized in the Time whereof he counts,

PREROGATIVE.

The Tenant may not tender the Demy Mark against the King. 20 Ed. 3. F. Droit. 15.

he shall be barred for ever.

But it shall not be joined upon the meer Right, but by the Party himself, not by Attorneyⁱ.

* 19 H. 6. 61. b. Newton. This *Essoign* lies only in a Writ of Right. ^b 16 Ed. 4. 9. b. 3 Ed. 3. Fitz. Droit 26.

ⁱ 19 H. 6. 61. b.

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* The Jury is called the *Grand Assize*, and shall be four Knights, or others in their Default, choosing a Jury of twelve to them. So Note sixteen Jurors, for the Grand Jury is always by more than twelve; and therefore no *Attaint* lies for him who loses in a Writ of Right, because this passes by the *Grand Assize*, which is by more than twelve¹.

In order to choose them, there shall issue to the Sheriff a *Writ Judicial* that is to say, when the Plea is in the *Common Pleas* (for if it be in the Lord's Court, or in the County Court, it is a *Writ Original* out of *Chancery*) to summon four Knights to return the *Grand Assize*, which is called a *Writ de Magna Assiza eligenda*. The Form is, *Summon by good Summoners four legal Knights of the Visne, &c. to make Recognition of the Great Assize, &c.*^m.

ⁿ The Tenant may choose his Trial by Battle, if he will; and therefore it is a sure way for the Demandant in a Writ of Right to have his Champions always ready, otherwise he may be deceived; and this Trial shall always be by Champions, for which Reason, in a Writ of Right, an Infant may join the Mife and try it by Battle, which he may not do in an Appeal, for there the Battle shall be in proper Person. These Champions ought to be ^a *Freemen*, not *Villains*, and so is the Issue, viz. *ready to defend the same by the Body of J. S. a Freeman*; and therefore if the Lord tender his Villain to be Champion for him in a Writ of Right, or in Appeal, this is a *Manumission*; and the ^b Champion of the Demandant ought to be such an one, as hath seen the Demandant, or his Ancestors in Seizin; of which he shall take his Oath.

Statutes.

Westminster 1. cap. 40. *Because it seldom happens [b] but that the Champion of the Demandant is forsworn, in that he sweareth, that he, or his Father, saw the*

^k 39 Ed. 3. 2. b. Dyer, 98. It shall be 12 besides the four Knights.
^l Bro. Attaint. 42. Post. 112. b. ^m F. N. B. 4. f.
ⁿ Old N. B. 2. 9 Ed. 4. 35. ^a 3 H. 6. 55. Bro. Chall. 196.
^b The Statute Westm. 1. c. 40. so recites.

Seizin of his Lord, or his Ancestor, and that his Father commanded him to deraign that Right, from henceforth the Champion of the Demandant shall not be compelled so to swear, nevertheless his Oath shall be kept in all other Points.

PREROGATIVE,

Against the King, the Judgment is not final, but is always with a *salvo jure Regis*. 20 Ed. 3. Fitz. Droit. 15.

The Judgment after the Mife joined, is final on every Part, not only where it passes by *Verdict*, or where he *vanquishes* the Champion of the other, but where the *Demandant* is *Nonsuit*, or the *Tenant* makes *Default*, or the *Vouchee* after such Issue joined by him, *departs* in despite of the Court ^d.

Recoveries bind every Stranger that doth not put in his Claim within a Year; as if the Disseizor suffer a Recovery, the Disseizee is bound by his Non-Claim ^e.

When in an Action, where the Services shall be recovered, (as in *Avowry* ^f, for there they shall be recovered inclusively, inasmuch as he shall have Return; in ** Assize* or *Præcipe quod reddat* of Rent, for there the Services are expressly demanded; but not in a *Per quæ Servitia* [†], for there nothing but Attornment is demanded, nor in *Justification in Replevin* [‡], for there the Defendant shall never have Return, nor shall he recover the Services expressly nor inclusively) there when the Tenant in a Court of Record, *viz.* the Common Pleas, (not Court Baron, or County Court) disclaims to hold of him, the Lord ^z shall have a Writ of Right upon this *Disclaimer*, and if he can prove, that the Land is holden of him, he shall recover the Land itself for ever, because the *Disclaimer* is of Record; and ^h therefore by such *Disclaimer*, he is barred of all Possessory Actions for the Services, as an *Assize*, *Cessavit*, *Ravishment of Ward*, and the like, but not of a Writ of *Escheat*, *Right of Ward*, *Right of Customs and Services*, &c. And altho' the Distress and *Avowry* of the Lord were lawfulⁱ, yet the Tenant who so disclaims,

^e F. N. B. 6. Dyer 301. ^d 20 H. 8. 8. ^e 5 Ed. 3. 50. ^f 13 H. 7. 27. ^{*} 5 Ed. 4. 2. [†] 13 H. 7. 27. [‡] 15 Ed. 4. 29. b. ^g Old N. B. 162. b. ^h 16 H. 7. 1. b. ⁱ 16 H. 7. 1. b.

34 Ed. 3. Fitz. Disclaim. 24.

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shall recover Damages of him, for the *Disclaimer* gives to the Lord a better Advantage, that is to say, the Land itself. But upon such *Disclaimer* in a Court Baron, or County Court, the Lord shall be amerced. The Form of *Disclaimer* is, *A.* (the Plaintiff in Replevin) saith, that *B.* (the Avowant) for any Thing before alledged, ought not to avow the taking of the Cattle aforesaid, in the Place aforesaid, in which, &c. because he saith, that he the same *A.* doth not hold of the same *B.* the Croft aforesaid, but the same to hold of the said *B.* altogether disavows and disclaims; wherefore he prays Judgment, &c.

The Writ of Right upon *Disclaimer* is the Writ of Right itself, in which the Demandant shall count the Tenure, of him, and his Seizin, a Replevin brought against him by the Tenant, his Avowry therein, and the *Disclaimer* of the Plaintiff in Replevin; by which said *Disclaimer* and *Disavowry* hath accrued to the same *B.* (the now Demandant) a Right of demanding the Croft aforesaid, in his Demain as of Fee.^k And that such is his Right, he offers, &c. Statutes. [89]

Westminster 2. cap. 2. Upon *Disclaimer* in a County Court, or the like, which is not a Court of Record, the Lord shall have a Writ to remove the Parol before the Justices, who alone^k may do Justice.

21 H. 8. cap. 19. Vide infra, that in Avowry for Services, the Plaintiff shall not disclaim.

Vide Gloucester, cap. 4. If he whose Land is charged in Fee Farm to the Value of the fourth Part, lets it lie fresh by two Years, the Lessor shall have Action to recover the Land in Demesne, if the other do not come before Judgment, and tender the Arrearages, and the Damages, and find Sureties, such as the Court shall think sufficient, to pay for the future, as is contained in the Writing of his Lease.

Vide Westminster 2. cap. 21. In the same manner the Lord shall have an Action upon Detainer of the Services by two Years. The Heir in this, and in the Case

^k Viz. The *Disclaimer* being there of Record, the Lord may have a Writ of Right upon the *Disclaimer*.

THE THIRD BOOK

of the Statute of Gloucester, shall have a Writ of Entry against the Heir; or the Alienee of the Tenant.

The Writs of Right in their Nature are, Writ of Escheat, (by reason of a Seigniory) Formedon, and Writ of Dower unde nihil habet.

The Writ¹ of Escheat, is for him who hath the Seigniory, (whether in Fee, or for Life) to have the Land which is escheated to him. The Form is, *Command A. that he render B. ten Acres of Land with the Appurtenances in N. which C. held of him, and which ought to revert to him the said B. as his Escheat, because the aforesaid C. died without Heir or (in the special Cases following) because the aforesaid C. was a Bastard, and died without Heir; or as his Escheat, because the aforesaid C. committed Felony, for which he was hanged, or for which he was outlawed, or for which he abjured the Realm*^m.

[b] Formedon, is a Writ of Right in its Nature, which entitles the Demandant by the Form of the Gift; and is a Formedon in Reverter, or Remainder; for a Formedon^a in Descender lies not at the Common Law, but is given by the Statute of Westminster 2. cap. 1. and is^b not of so high a Nature as a Formedon in Reverter, or Remainder, for in them the Fee Simple shall be recovered.

The^c Formedon in Reverter, is for the Donor after the Estate Tail determined. As (at the Common Law) if the Donee alien before Issue had, and afterwards die without Issue, or if he hath Issue, and afterwards he or his Issue die without Issue. Otherwise it is if he had Issue, and afterwards had aliened and died without Issue.

The Form is, *Command A. that he render to B. one Messuage, &c. which the same A. (or C. the Father of the aforesaid B. whose Heir he is) gave to J. and F.*

¹ F. N. B. 144. m. 7 R. 2. Fitz. Escheat. 4. ^m 'Tis observable from the Form of the Writ, that an Escheat doth happen two manner of Ways, one without Attainder as for Default of Heir, the other by Attainder as for Felony, and in the latter Case by Judgment three Ways only, *aut quia suspensus per collum, aut quia utlagatus, aut quia abjuravit regnum.* ^a Bro. Formedon 69. Plowd. 239. 2 Inst. 336. F. N. B. 212. ^b 6 Co. 7. b. Doc. Pla. 66. ^c F. N. B. 219. c. 30 Ed. 1. Fitz. Formedon, 65. his

his Wife, and to the Heirs of their Bodies issuing, and which after the Death of the aforesaid J. and F. ought to revert to the aforesaid B. by the Form of the Gift aforesaid, because the said J. and F. died without Heir of their Bodies issuing.

The *Formedon in Remainder* lies for him in Remainder for ^d Life, or in ^e Fee, upon a Lease for Life expired; for after the Estate Tail expired^f, this Writ did not lie at the Common Law, because it was an Estate in Fee Simple, whereupon no Remainder could depend. The Form is, *Which C. gave to D. and to the Heirs of his Body issuing, so that if the said D. should die without Heirs of his Body issuing, the aforesaid Mesuage, &c. should remain to the aforesaid B. and his Heirs, and which after the Death of the aforesaid D. ought to remain to the aforesaid B. by the Form of the Gift aforesaid, because the aforesaid D. died without Heir of his Body issuing, as it is said, and unless, &c.*

The Writ of *Dower unde nihil habet* lies for the Wife, who hath received no Part of her Dower*.

The Form is, *Command A. that he render to B. who was the Wife of C. her reasonable Dower which belongeth to her of the Freehold which the aforesaid C. her late Husband had in N. whereof she hath nothing, as she saith, and whereof she complains that the aforesaid A. deforceth her; and unless, &c.*

The Demand here shall be in lieu of Count.

No special Effoign lies[†].

The ^g Parol shall not demur for Nonage of the Heir, nor for the Nonage^h of the Heir of the Vouchee in a *Quod ei Deforceat* upon Recovery in a Writ of Dower, for this is in Nature of the first Writ.

ⁱ Warranty of the Ancestor is no Bar.

* Issue upon the Death of the Husband, shall be tried by Witnesses, so it shall not be in any other Case in our Law.

^d Old N. B. 148. 149. ^e F. N. B. 217. ^f Plowd. 235. ^g 2 Inst. 336. * Old N. B. 6. [†] 44 Ed. 3. 15.
^h Fleta, lib. 1. c. 9. pl. 3. lib. 6. c. 43. pl. 4. Briton, 217.
 39 H. 6. 39. ⁱ 3 Bulst. 135. ^h 44 Ed. 3. 43. Fitz. Age. 38. 1 Rol. Abr. 137. 1 Rol. Rep. 251. ⁱ 21 Ed. 4. 82. b.
^k 8 H. 6. 23. b.

[90] Writ of Dower shall be brought against ¹ Guardian in Chivalry, although he is not Tenant of the Freehold, and not against ^m the Heir. The ^a Reason it lies against the Guardian in Chivalry is, because the Tenant of the Freehold is named, for it shall be, *Command A. Guardian of B.* But it does not lie against ^o Lessee for Years of a Guardian, nor against ^a Guardian in Socage.

^b Where a Feme Guardian in Socage brings a Writ of Dower against the Guardian in Chivalry, she at her Prayer shall be adjudged to endow herself (according to the Value of the whole) of the Land in Socage; which is called *Dower de la plus Beale*. The Form of the Entry is, *A. demands against B. Dower, &c. and B. comes and says, that A. holds in her Custody Lands and Tenements, which are holden in Socage in L. of the Heir of W. Son and Heir of the aforesaid J. (Husband of the Demandant) which descended to him in Fee-Simple, sufficient, &c. whereof the aforesaid A. may be endowed. And the aforesaid A. cannot deny this; therefore it is considered, that the aforesaid A. take of the Lands and Tenements of the Heir aforesaid, which are in her Custody, to the Value of the aforesaid third Part with the Appurtenances, to hold in the Name of her Dower, for the aforesaid third Part above, by her demanded, &c.* But such Dower shall not be where the Feme is Guardian in Deed in ^c Chivalry, nor where all the Lands of the Husband are holden in Socage ^d, and she brings a Writ of Dower against the Heir, nor where she brings such Writ against the Feoffee of her Husband with Warranty, for he may vouch the Heir ^e.

Statutes.

Vide Merton, cap. 1. *In this Writ Women shall recover against the Deforceors of their Dower, or Quarentine, Damages from the Time of the Death of the Husband of the Land whereof the Husband died seized.*

¹ Bro. Præcipe quod reddat, 35. ⁸ Ed. 3. 384. ^a 9 H. 6. 6. b. ⁿ 1 Ed. 3. 3. ^o 8 Ed. 3. 384. Bro. ibid. ^a 9 H. 6. 6. b. Co. Litt. 35. a. Perk. §. 404. ^b Littlet. §. 48. ^c Perk. §. 455. ^d Ibid. §. 451. 452. ^e 21 Ed. 3. 28. 25 Ed. 3. 5. Perk. §. 453.

Westminster 1. cap. 49. *The Writ of Dower unde nihil habet shall not be abated, although that she hath received Part before the Writ purchased, that is to say, if it be not of the same Defendant, and in the same Town.*

Westminster 2. cap. 4. *If a Man lose by Confession, the Justices shall adjudge Dower to the Wife; but it is now ordained, that if he lose by Default, then in a Writ of Dower, if the Tenant can maintain his Title to prove the Recovery against her Husband good upon a true Title, she shall be barred of her Dower, otherwise not.*

If she recover Dower against the Guardian, the Heir at full Age, shall have a Mortdancestor against the Feme, in which if the Feme can maintain that she had Right, she shall retain her Dower.

Writs mixed in the Right are called Writs of Entry; which are to disprove the Possession of the Tenant, by reason of his first Entry.

Here the Tenant in Fee Simple, who makes his Demand of the Possession of his Ancestor, shall say in the Writ, "Which he claims to be his Right and Inheritance."

Tenant in Tail, or for Life, shall not say so, but shall shew his special Title in the Declaration*. Nor shall he, who claims of his own Possession, have those Words in the Writ, except only in a *Cui in Vita*, or *Cui ante Divortium* brought by a Feme of her Inheritance aliened by her Husband†. [b]

A Writ of Entry is against the first Party, or within the Degrees. Against the first Party, when it is against him to whom the first Alienation was made, or who did the first Disseizin.

Within the Degrees, is that which is against him who comes in within two Degrees under the first Party; and it is in the *Per*, or in the *Per and Cui*.

In the *Per*, when he, against whom it is brought, comes in immediately under the first Party, viz. as Heir to him, or by his Alienation.

* Old N. B. 124. b. F. N. B. 201. f.
† Post. 91. a.

• F. N. B. ibid.

THE THIRD BOOK

In the *Per and Cui*, when he against whom it is brought, comes in immediately under the Heir or Alienee of the first Party. ² For upon more Alienations than these two, (that is, the *Per*, or the *Per and Cui*) the Demandant is put to his Writ of Right; and the Reason is, to the intent that there should be an end of Suits. For no Writ of Entry in the *Post* lay at the Common Law, but this is given by the *Statute of Marlbridge*, cap. 29. which Writ of Entry in the *Post* lies by the said *Statute*, when he, against whom the Action is brought, comes in neither in the *Per*, nor in the *Per and Cui* ^h, but either out of every Degree, as by Abatement, Disseizin, Escheat, Recovery, Election, Succession, Dower, Judgment, &c. or as the third or more remote Alienee. And there the Writ shall say, *Whereof he complains, that the aforesaid A. (the Tenant) hath unjustly deformed him* ⁱ. But these Words shall not be in any Writ of Entry in the *Per and Cui*.

The Form of all these is thus. In a Writ of Entry in the Nature of an Affize against the Party himself who did the Disseizin, "*Command A. that he render to B. one Messuage, &c. of which A. unjustly, and without Judgment disseized B. &c.*" Or in other Form, viz. "*Of the Possession of his Father, or Mother, or other Ancestor, of which he unjustly disseized C. the Father, or other Ancestor of B. whose Heir he is, &c.*" In the *Per* thus. "*Into which the same A. hath not Entry, but by C. who demised it to him, who thereof unjustly &c. disseized B. &c.*" Or in other Form. "*Who thereof unjustly &c. disseized E. the Father &c. of the aforesaid B. &c.*" In the *Per and Cui* thus. "*Into which the same A. hath not Entry but by C. to whom D. demised it, who thereof unjustly &c. disseized B.*" Or in other Form; "*who thereof unjustly &c. disseized E. the Father, &c. of the aforesaid B.*" In the *Post*, thus: "*Into which the same A. hath not Entry, but after the Disseizin which D. unjustly made to the aforesaid*

² 6 Co. 9. b. Co. Litt. 238. b.
try, 66. ⁱ F. N. B. 201. e.

^h 5 Ed. 2. Fitz. En-

B." Or in other Form; "*Unjustly did to E. the Father, &c. of the aforesaid B. and whereof he complains, that the aforesaid A. unjustly deforceth him.*" The same Form is in a *Dum fuit infra ætatem*, and all other Writs of Entry upon an Alienation.

[91]

Statutes.

Marlbridge, cap. 29. *Where the Alienations are by so many Degrees, that a Writ does not lie, the Plaintiff shall have a Writ without mentioning the Degrees.*

Writs of Entry arise either from some Tort at the first, an Ouster, or Discontinuance, or without any such Tort.

Those which arise upon an Ouster, are upon a Disseizin, or an Intrusion.

Upon a Disseizin, when the Disseizin is done to him or his Ancestors, as a Writ of Entry in the *Quibus*, or, which is all one, in the Nature of an Affize. The Form whereof is put here immediately before^k.

That upon an *Intrusion*, is called a Writ of Intrusion^l, and lies for him in Reversion, or Remainder in Fee Simple, or for Life, (not in Tail, for he shall have a *Formedon*, nor for Years, for he hath not the Freehold) after the Death of the Tenant for Life, in Dower, or by Curtesy; and if Land be given to two, and to the Heirs of one, and he that hath the Fee dies, and afterwards Tenant for Life dies, now the Heir of him in the Remainder shall have this Writ. And it lies also for the Assignee of the Assignee of him in Remainder.

The Form is, *Into which he hath not Entry, but by the Intrusion which he made into it after the Death of C. to whom the aforesaid B. demised it for Life, &c.*

^m Upon a Discontinuance, are ^a *Cui in Vita*, and *Cui ante Divortium*, upon the Alienation of the Husband, who hath discontinued the Fee Simple, the Estate Tail, or Freehold, whether Dower or otherwise, which belonged to his Wife, or jointly to both.

^k F. N. B. 191. c. d.

^l F. N. B. 204. d.

^m F. N.

B. 193. a. 204. f.

^a Now out of Use, because by the Stat. 32 H. 8. the Alienation of the Husband does not toll the Entry of the Wife.

And in these Writs^b, if she claims the Fee Simple, she shall say, "*Which she claims to be her Right and Inheritance*, although it be of her own Possession; but not where she claims an Estate Tail, or Freehold, for there the Writ shall make special mention of the Estate.

Cui in Vita lies for the Wife, after the Death of her Husband.

The Form^c is, *Command A. that he render to B. who was the Wife of D. one Messuage, &c. into which the same A. hath not Entry, but by the aforesaid D. sometime the Husband of her the said B. who demised it to him, whom she in her Life Time could not contradict, as she saith, &c.*

Cui ante Divortium, lies for the Wife after Divorce.

[b] The Form is^d, *Into which, &c. but by the aforesaid D. sometime the Husband of her the said B. who demised it to him, whom she could not contradict before the Divorce between them solemnized.*

If this be of an Estate in Fee Simple, and she do not bring the *Cui in Vita*, or *Cui ante Divortium* in her Life Time, the Heir shall have a *Sur Cui in Vita*; but of an Estate Tail, a *Formedon* only lies for the Heir^e.

The Form is, *Into which, &c. but by C. sometime the Husband of D. the Mother of the aforesaid B. whose Heir he is, who demised it to him, whom in her Life Time, (or before the Divorce between them solemnized,) she could not contradict, as it is said, &c.*

Writs of Entry, which arise without any Tort at first, are grounded either upon a *Disability* of the Person who made the first Estate, or upon the *Determination* of the same.

Upon the *Disability*, as *Dum non fuit compos Mentis*, and *Dum fuit infra ætatem*.

Dum non fuit Compos Mentis, is upon an Alienation of himself, or his Ancestor, being of unsound Memory^f.

^b F. N. B. 201. f. Ante, 90. b.

^c F. N. B. 193. a.

^d F. N. B. 204. f.

^e F. N. B. 193. a.

204. k.

^f F. N.

B. 202. c.

Reg. Orig. 228. b.

Co. Litt.

247. b.

2 Inst. 482.

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The Form is, *Command A. that he render to B. one Messuage, &c. which the same B. demised to him, while he was not sound of his Mind, as he saith, &c.*

Dum fuit infra etatem, is by an Infant, when he comes of full Age upon the Alienation of himself, or his Ancestor, being within Age. For although it be of the Alienation of his Ancestor, yet he shall not have this Writ until he comes of full Age^a.

The Form is, *Command A. that he render to B. who is of full Age, as he saith, two Messuages, &c. which the same B. while he was under Age demised to him, as he saith.*

But the Clause, that he is of full Age, viz. "*Who is of full Age*", shall not be inserted in the Writ, but only when it is brought upon a Demise made by the Demandant himself to the Tenant; not when it is brought in the *Per*, *Cui*, or *Post*, or upon the Alienation of his Ancestor.

Those grounded upon the *Determination* of the Estate, are by Reason, either of the *particular Estate ended*, or of a *Condition broken*.

Of a *particular Estate ended*, as, *Entry ad Communem Legem*, or *ad Terminum qui præteriit*.

Entry ad Communem Legem, is when Tenant for Life, be it for his own Life, or for the Life of another, Tenant in Dower, or by Curtesy of England aliens and dies, then he in the Reversion shall have this Writ^b.

The Form is, *Into which the same A. hath not Entry but by C. to whom the aforesaid B. (or D. his Ancestor, whose Heir he is) demised it for the Life of the said C. as he saith. And unless, &c.*

[92]

Statutes.

Gloucester, cap. 7. ^a *If Tenant in Dower aliens, be in Reversion shall have a Writ of Entry presently.*

Ad Terminum qui præteriit, is upon Deforcement^b by Lessee for Life, or for Years, or by a Stranger

^a F. N. B. 192. g. ^b F. N. B. 207. g. ^c This is called a Writ of Entry in Casu Proviso. If Tenant by Curtesy, or for Life alien, he shall have a Writ of Entry in Consimili Casu, by Westminster 2. c. 24.

^d F. N. B. 201. d.

after the Lease^c expired, whether the Lessee alien or not. For this Writ lies against Tenant at Sufferance, viz. against him, who, after a Lease for Years, or for the Life of another made to him, holdeth over his Term. But it^d does not lie after the Death of Tenant in Dower, or by Curtesy, for this is not properly called a Term.

The Form is, *Into which the same A. hath not Entry but by C. to whom the aforesaid B. demised it for a Term which is passed, as he saith; and unless, &c.*

By reason of a Condition broken, is *Causa Matrimonii prælocuti*; which lies for a Woman who gives Land, or the like, to a Man to marry her, and he will not; but it does not lie of Land so given in Tail, if she hath not a Deed to shew that intent, for this should be contrary to the Statute *De donis Conditionalibus*, to defeat an Estate Tail by Intendment, or Thing averrable only, and not by Matter express^e. Also this Writ does not lie for a Man who gives Lands to a Woman to marry him^f.

The Form is, *Which the same B. demised to him by reason of a Marriage before treated of between them, wherefore he ought to have married her, and hath not yet married her, as she saith, &c.*

Such are *Writs in the Right*. A *Præcipe quod reddat*, which is *Possessory Ancestrel*, is that which is brought by the next Heir upon an Abatement after the Death of any Ancestor, if it be not his Father, Mother, Brother, Sister, Uncle, Aunt, Nephew, or Niece (for of these an Affize of Mortdancester lies, as shall be said hereafter) who died seized in Demesne as of Fee the Day of his Death, although that he was disseized the same Day that he died, for Seizin the same Day that he died amounts to a dying seized. And therefore this lies always against Strangers, not for one Heir against another Heir of the same Ancestor. Of this Nature are the Writ of *Aiel*, after the Death of his Grand-

^c Viz. by Efflux of Time or Surrender.

^d Old N. B. 124

& 136. d. ^e F. N. B. 205. c. 8 Ed. 2. Fitz. Entry, 78.

^f F. N. B. 205. f. 6 H. 4. 1. 5 Ed. 2. Fitz. Cui in Vita, 24. Dyer, 147. pl. 75. Co. Litt. 204. a.

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father, or Grandmother; Writ of *Besaiel*, after the Death of his Great Grandfather, or Great Grandmother; Writ of *Cousnage*, after the Death of his Great Great Grandfather, or Great Great Grandmother, or any other collateral Cousin, as the Brother of his Great Grand Grandfather, &c.

The Forms are, "*Command A. that he render to B. one Messuage, &c. of which W. the Grandfather, or the Grand mother (in the Writ of Aiel)*" of which *W. the Great Grandfather, or the Great Grandmother, (in the Writ of Besaiel)*, and *(in the Writ of Cousnage)* "*of which W. the Cousin of the aforesaid B. whose Heir he is was seized in his (or her) Demesne as of Fee, on the Day whereon he (or she died) as he saith, &c.*"

Statutes.

Westminster 2. cap. 20. *In Writs of Cousnage, Aiel, or Besaiel, the Point shall be inquired, whether the Demandant be next Heir, as in a Mortdancestor.*

Such is a *Præcipe quod reddat*. Writs which do not contain any Express Demand in the Writ, are *Nuper obiit*, and *Affize of Mortdancestor*.

Nuper obiit is where any Ancestor whatever, as *Tresaiel*, or the like, dies seized in his Demesne as of Fee, altho' he was disseized the same Day that he died, for this is in Law a dying seized, as is aforesaid; then this Writ lies for one Heir against another Heir of the same Ancestor, who entered after his Death, and deforced the Demandant^h. And therefore this lies always for Privies of Blood; and inasmuch as it is but to try the Privy of Blood, View nor Voucher does not lie in it, and Non-tenure is no Pleaⁱ.

The Form is, *If A. and B. shall make you secure, &c. then summon, &c. C. that he be before our Justices at Westminster (on such a Day) to shew wherefore he deforceth the aforesaid A. and B. of their reasonable Part which falleth to them of the Inheritance which was W.'s of N. the Father (Mother, or other Ancestor) of the aforesaid A. B. and C. whose Heirs they are, and who lately died, as it is said, &c.*

^s F. N. B. 221. d. &c. Post. 124. b.

^h F. N. B. 197. a.

ⁱ Plowd. 306.

The other is *Affize of Mortdancestor*. This, the *Affize of Novel Disseizin*, *Affize of Nuisance*, and *Affize of Darrein Presentment*, are called *Affizes*, because in them, as also in a *Juris Utrum*, the Writ with the original Process against the Party commands also a Jury, as well as the Defendant to be impannelled and summoned^k; which Summons to the Jury serves in lieu of a *Venire facias*, so that the Process there is, *Summons*, *Habeas Corpora*, and *Distringas*^l.

The Form of the Entry in *Affize of Novell Disseizin* is, *The Affize comes to recognize if, &c. A. unjustly and without Judgment disseized B. of, &c. And in Mortdancestor, The Affize comes to recognize if W. the Father of B. whose Heir he is, was seized in his Demesne as of Fee &c. the Day that he died, &c.*

Upon Default after the original Process ended, that is to say, the *Attachment* in *Affize of Novell Disseizin* and *Nuisance*, *Summons* and *Resummons* in *Mortdancestor* and *Affize*^b of *Darrien Presentment*, the Inquest shall be awarded by Default, be the Default immediately upon the *Resummons*, or after *Essoign* or *Plea*, as it should be if the Tenant had appeared.

[93] The Defendant may plead in *Abatement* and over in *Bar*, or take the general Issue also, as in *Mortdancestor*, ^a that he hath nothing but in the Right of his Wife, or that J. S. holdeth parcel of the Land in Demand not named in the Writ *Et si trove ne soit*, &c. then that he hath not abated. In *Affize*^a, *Jointenancy*, or *Misnomer* which are in *Abatement*, or any Matter in *Bar* (except that he confess an *Ouster*, or, which amounts to the same, if he plead a *Release*, or the like) *et si trove ne soit*, &c. *null Tort*, *null Disseizin*.

And he shall have divers Pleas, two, three, or more in *Abatement*, as *null tiel Ville*, *Hamlet*, or *Place* known by the Name, &c. *et si trove ne soit*, &c. then no Tenant of the Freehold named in the Writ, &c.^c

Also he may plead a special Matter which amounts

^k See the Forms. ^l Old N. B. 106. in *Aff. de nov. Diff.* & 25. in *Aff. de darr. Presentm.* ^a F. N. B. 196 g. ^b Ibid. 50. k.

^c 40 Ed. 3. 29. b. ² Ed. 3. 62. ^d 22 Ed. 3. 49. b. ^e 1 Ed.

4. 4.

but to the general Issue: As in Assize of Rent by Dean and Chapter, to say, that Rescous was done to the Predecessor, and no Seizin in him, or in other Successor at that Time, altho' that in Pretence of him who so pleaded the same, this does not amount to any more than that the Plaintiff was never seized so that he might be disseized^f.

The Jury (which here are properly called the *Assize*) shall inquire of a Plea in Abatement, altho' the Issue be upon *Seizin* and *Disseizin*, or the like; and therefore no Plea in Abatement is there answerable^g.

Statutes.

Vide 34 Ed. 1. De conjunctim Feoffatis. *If the Defendant in Assize of Novell Disseizin, Mortdancestor, or Juris utrum, pleads Jointenancy of his Part by Deed, the Plaintiff may answer to it.*

Upon Assize by an Infant, and Matter in Pais in the same County pleaded against him, (whether in Abatement, ^h as in Assize of Rent, that he hath made his Plaint of the Land itself whereout he supposes the Rent to be issuing; or in Bar, as the Deed of his Ancestor with Warranty) the Jury shall inquire of the Circumstancesⁱ; otherwise it is in a ^k Writ of *Entry sur Disseizin*, or other ^l *Præcipe quod reddat*, for there the Point put in Issue, and no other, shall be tried by the Jurors. Otherwise it is also in Assize, upon Recovery or other Matter of Record pleaded against him, there he shall answer, and the Jury shall not inquire of the Circumstances, for the Court shall plead and maintain the Matter for him^m. The same Inquiry shall be in Assize against an Infant, if he plead to the Assize at large; otherwise it is if he plead in Bar, for there if the Plaintiff makes Title, as by Statute Merchant, &c. and the Infant traverse the Title, which is found against him, the Plaintiff shall have Judgment without inquiring of the Circumstances, because the Issue is taken out of the Point of the Assize: Wherefore it is all one as if the Infant was of full Age. And therefore it

^f St. Pl. Cor. 82. c.

^g Plowd. 91.

^h 11 Aff. pl. 6.

ⁱ 48 Ed. 3. 33.

^k 9 Ed. 4. 34.

^l 48 Ed. 3. 33.

^m 48 Ed.

3. 33.

is better for an Infant to plead to the Affize at large, than otherwise^a.

[b] ^o *Affize of Mortdancestor* lies for the next Heir upon Abatement, after the Death of the Father, Mother, Brother, Sister, Uncle, Aunt, Nephew, Niece, (for if it be after the Death of any other Ancestor, *Aiel, Besaiel, or Cousinage* lies, not *Mortdancestor*). who died seized in his Demesne as ^a of Fee, altho' he ^b was disseized the same Day that he died, for yet in Law this is a dying seized. And the ^c three Points to be inquired in *Mortdancestor* (all expressed in the Writ) are, (1.) If the Ancestor was seized in Fee the Day of his Death. (2.) If the Demandant be next Heir. (3.) If the Ancestor died seized within 50 Years before the Writ purchased. But upon ^d Land given to a Man and his second Wife (he having a Son by another Wife) and to the Heirs of their two Bodies, the Son between them begotten shall not have a *Mortdancestor* (after the Death of the Father surviving the second Wife) for he is not next Heir, but his elder Brother: And therefore by the Common Law he was put to a *Formedon in Descender*, which was but a Writ formed upon his Case. Same Law ^e if the Ancestor was seized in Tail, Remainder to his right Heirs, that is to say, a *Mortdancestor* does not lie; for there of the Demesne he is seized in Tail, not in Fee.

The Form is, *If A. shall make, &c. then summon, &c. twelve free and lawful Men of the Neighbourhood of N. that they be before our Justices at Westminster in eight Days, &c. ready upon their Oath to recognize if W. the Father of the aforesaid A. (or Mother, Sister, Brother, Uncle, or Aunt) was seized in his Demesne as of Fee of one Messuage, &c. in N. the Day wherein he died; and if he * died within 50 Years now last past, and if the same A. be his next Heir; and in the mean time let them view the*

^a 28 Aff. pl. 21. ^o F. N. B. 195. c. Co. Litt. 159. a. 2 Inst. 291. ^a F. N. B. 196. k. ^b Ibid. 195. d. ^c Dy. 310. pl. 82. 2 Inst. 399. ^d 10 Ed. 2. Fitz. Formedon 55. Plowd. 239. ^e F. N. B. 196. k. * Note. The old Form was, And if he died after the Coronation of Lord Henry the King; but this Time of Limitation of Seizin in this Writ is altered by the Statute 32. H. 8. c. 2.

Messuage aforesaid, and cause the Names of them to be put in the Writ, and summon, &c. B. who now holds the Messuage aforesaid, that he be there to hear that Recognizance; and have there the Summoners and this Writ.

And if an Infant bring this Writ, the Writ shall not say, *And if he died within 50 Years, &c.* for this appears by his Age †.

† The Process in *Affize of Mortdancestor* is *Summons* and *Resummons*.

§ If the Tenant, whether Ter-tenant or Tenant by his Warranty, traverse any of the Points of the Writ (as the dying seized of the Ancestor, &c. which goes in Abatement of the Writ) yet the Jury shall inquire of all the Points, as whether the Plaintiff be next Heir, and if the Ancestor died within fifty Years; and if any of them be found against the Demandant, the Writ shall abate. But a Plea in Bar of the Affize by Matter of Record, Release, collateral Warranty, or the like, out of the three Points of the Affize, is peremptory to the Tenant, if it be found against him. ^h And if such Plea in Bar be found against the Tenant, and yet the Jury inquire over, and find any of the Points of the Writ against the Demandant, as that his Ancestor did not die seized, &c. he shall recover notwithstanding that. For such Inquiry ought not to be upon a Plea in Bar. [94]

It appears to *Dyer*, that the Law is so also where the Tenant vouches, and the Demandant counterpleads the Voucher, that is to say, that in this Case, altho' the Counterplea be found for the Demandant, yet all the Points shall be inquired, and upon any found against the Demandant, he shall not recover. But *Fitzberbert* is to the contrary in this Case, because it is a Plea in Bar, and not to the Writ †.

Statutes.

Vide Magna Charta, cap. 12. *Affizes of Novell Disfeizin and Mortdancestor shall be taken in the County where*

† 2 Ed. 3. 62. § 8 Aff. pl. 13. Bro. Default, and App. 88.
F. N. B. 196. g. § Dyer, 311. a. 2 Inst. 399. ^h 40
Ed. 3. 48. 39 Aff. pl. 13. 2 Inst. 399. agrees with the
Opinion of *Dyer*.

THE THIRD BOOK

the Land lies, by Justices of Assize, and upon any Difficulty, shall be adjourned into the Bench.

Vide Marlbridge cap. 16. Gloucester cap. 3. and Westminster 2. cap. 4. *in what Cases it is given.*

Gloucester cap. 6. *The Aunt and the Mother shall join in a Mortdancestor.*

C H A P. VI.

Of Actions in the Realty.

THE Actions in the Realty are such as are to recover some Hereditament, or real Thing concerning an Hereditament.

In the Actions of the first Sort, if the Plaintiff demands of his own Seizin, the Writ shall be in the *debet & solet*; if he demands of the Seizin of his Ancestor, it shall be in the *debet* only; and then it is in all respects as a Writ for the meer Right, that is to say, triable by *Battle*, or the *Grand Assize*^k.

The Process is *Summons*, *Attachment*, and *Distress infinite*^l.

The *Summons* herein shall be of the Defendant by his Goods^m.

[b] *Attachment* is a Process to take Surety of the Defendant by certain of his Goods, meer personal Chattels, that is to say, not real as a Ward, or the like, nor Parcel of his Freehold, as a Clod of Earth, &c. to the intent that he may be there to answer. These Goods he shallⁿ forfeit, if he do not appear. And therefore it shall be of his own^b proper Goods, not borrowed, nor Goods in pledge to him. And^c the Sheriff may take these Goods with him, or leave them with the Party, at his Pleasure: But which ever of these Methods he takes, the Property is not out of the Party, until he makes Default.

The Form is, *Put by Gages and safe Pledges B. that he be before our Justices, &c. to answer A. of a Plea, &c.*

^k F. N. B. 151. g.

^l 21 H. 6. 56.

^m 22 H. 6. 38.

ⁿ 2 Inst. 254.

^b 7 H. 6. 10.

^c 27 H. 6. 2.

^a 9 H. 7. 9.

^b 35

H. 6. 25. Bro. Attachm. 20.

^c 9 H. 7. 9.

The

The Form of the *Distringas* is, *We command you that you distrain A. by all his Lands and Goods in your Bailiwick, so that neither he nor any for him may lay hands upon them, until you have other Order thereof from us, and that of the Profits thereof you answer to us, and that you have his Body before our Justices, &c. on, &c. to answer W. of a Plea, &c. and to bear his Judgment of many Defaults.*

Statutes.

Vide Westminster 2. cap. 37. *No Distress shall be but by Bailiffs sworn and known.*

Vide Westminster 2. cap. 39. *Averment is given to the Plaintiff, that the Sheriff might have returned greater Issues.*

Vide 1 Ed. 3. cap. 5. *Such Averment of too small Issues returned is given against the Bailiff of a Franchise.*

If *Nihil* be returned upon the Summons, then shall issue continual *Capias* *.

In Actions of this Kind (such as are not in Point of Seignior, as in Writ of *Annuiti*, *Quare impedit*, *Quo jure*, *Quod permittat*), upon Default after Plea, Issue, or Demurrer, Distress shall issue in lieu of *Petit Cape*: Which is called the *Grand Distress*: And there and upon the View granted, Day shall be given as in Plea of Land; for it is as in Nature of a *Præcipe quod reddat*, inasmuch as by this it is to recover the Land itself.

Such Actions are,

1. For with holding of Services, *Writ de Consuetudinibus & Servitiis*, and *Setta ad Molendinum*.

The *Writ de Consuetudinibus & Servitiis* lies for the Lord who hath an Estate for Life, or a greater Estate in the Seignior, if he be deforced ^b.

The Form is, *Command A. that he do to B. the Customs and Services which he ought to do to him* (when it is in the right only) *or which he ought and is accustomed to do* (when it is of his own Seizin) *for his Freehold which he holds of him in C. as in Rents, Arrearages, and other Things; or thus, in Homage, Reliefs, and other Things;* [95]

* 21 H. 6. 56.
30 H. 6. 8.

2 Ibid.

^d 2 H. 4. 1. b.

^e F. N. B. 151. b.

^c Old N. B. 69.

or thus, in Suits of Court, and other Things: And unless, &c.

Señta ad Molendinum lies for the Lord, when his Tenants, who hold of him by the Service to grind their Corn at his Mill, with-hold their Suit, and grind elsewhere. The Form is, *Command A. that he do his Suit to the Mill of E. of N. in C. which he ought to do to it (or which he oweth to it, and hath been used to do) as it is said*¹.

2. In Matter of Common, *Quod permittat*, and *Quo Jure*.

Quod permittat lies for him who hath Common of Pasture for his Beasts, or Common of Turbary, Piscary, or 'Estovers, if he be disturbed by a Stranger so that he may not have it. The Form is, *Command A. that justly, &c. he permit B. to have Common of Pasture in H. and in 40 Acres of Wood, which he ought to have, as it is said. And unless, &c. then summon, &c*^k.

Statutes.

Westminster 2. cap. 24. *Where the Parson of a Church is disseized of Common of Pasture, the Successor shall have a Quod permittat against the Heir of his Disseizor.*

Quo jure lies for the Ter tenant against him who claims Common there, to try if he hath Right to have it, or not. The Form is, *If A. shall make, &c. summon B. that he be, &c. to shew by what Right he demands Common of Pasture in the Land of him the said A. as the said A. hath no Common in the Land of him the said B. nor doth the said B. Service to him for which he ought to have Common in the Land of him the said A. as it is said, &c*^l.

3. In Matter of Annuity, *Writ of Annuity*, which lies for him^m who hath an Annuity in Fee or for Life, and altho' it be but for Years, whether it be of Money or other Thing, as Clothing, Bread, &c. And it is in the *Debet* for all of them, that is, for any other Thing as well as for Money, not in the *Detinet*, con-

¹ F. N. B. 122. m.
128. f.

^m F. N. B. 152.

^k F. N. B. 123. f.

^l F. N. B.

trary to an Action of Debt. The Form is, *Command A. that he render to B. one hundred Marks, and the Moiety of three Garments with costly Fur, and of two Garments with fine Linen, which are in arrear to him of the yearly Rent of Ten Marks, and the Moiety of one Garment with Fur, and of one Garment with fine Linen, which he oweth to him, &c. ||.*

The Actions which are to recover any real Thing concerning an Hereditament, are these which follow.

Writ of *Mesne*, where the *Mesne* suffers the Lord Paramount to distrain the Tenant for the Service which he, that is, the *Mesne*, ought to acquit. The Form is, *Command A. that justly, &c. he acquit B. of the Service which C. requires from him for his Freehold, &c. whereof the said A. who is Mesne between C. and the aforesaid B. ought to acquit him, &c. ⁿ.* [b]

Statutes.

Westminster 2. cap. 9. *In Writ of Mesne the Grand Distress shall be with two Proclamations, and if the Mesne makes Default, he shall lose ° his Mesnalty, and the Tenant shall hold of the Lord by the Services of the Mesne altho that he held of the Mesne by lesser Service than the Mesne held over.*

Upon Nihil returned to the Summons and Attachment, yet the Grand Distress and Proclamation shall issue.

Upon Return by the Sheriff of Nihil in the same County, Judicial Summons until the Grand Distress with Proclamation shall issue in the County where it is testified that he hath Land, and in the County where the Distress was taken also, and after Proclamation in both Counties he shall be forejudged.

If the *Mesne* come in and acknowledge the Acquittal, or be adjudged of Acquittal, and afterwards doth not acquit him, a Judicial Writ of *Distringas ad Acquietandum* shall issue, in which if the Defendant comes, and it be found against him, the Plaintiff shall recover Damages, and also shall forejudge him. If the Defendant makes

|| Note, The Rule in the Register is, That this Writ does not lie for Executors, but they shall have Action of Debt. ⁿ F. N. B.

135. m. ° Which is called Process of Forejudger.

Default,

Default, another Distress with Proclamation shall issue, in which shall be the same Judgment as is aforesaid.

This Statute extends only where there is but one Mesne between the Lord Paramount and the Tenant, and that Mesne of full Age. And when the Mesnalty may be lost without Prejudice to any other, that is, where the Mesne is not Tenant in Dower, by Curtesy, for Life, or in Tail.

^p Writ of Warranty of Charters, where he who ought to warrant the Lands or Tenements, by reason of Feoffment, Release ^q, or Confirmation with Clause of Warranty, suffers the Tenant to be impleaded. But if he be ^r impleaded in such Action wherein he may vouch, and he lose without Voucher, there he shall not have this Writ. The Form is, *Command A. that justly, &c. he warrant to B. one Messuage, &c. which he holds, and claims to hold of him, and whereof he has his Charter (or the Charter of D. his Father, or Mother, or other Ancestor whose Heir he is) as it is said.*

[96] But altho' the Writ supposeth, that he holdeth of the Defendant, yet it is not material, whether he holdeth of him, or not. And also in some Cases the Words *Whereof he hath his Charter*, are not material, viz. where the Plaintiff holdeth of the Defendant by *Homage Ancestrel*, which implies Warranty.

The Hereditaments ^s of him who ought to warrant are liable here from the Time of the Action brought, and therefore it is Policy for a Man to bring his *Warrantia Chartæ* before that he be sued, for upon Voucher when he is sued, he shall not recover in Value but such Lands as the Vouchee hath at the Time of the Voucher ^t.

Curia claudenda, where he who hath a Close adjoining to my Freehold (for the Writ lies for a Freeholder, not for Tenant for Years) will not keep it inclosed where he ought to do it ^u. The Form is, *Command A. that he justly inclose his Land, which is open to the Nuisance of the Freehold of B. in the same Town (or in another Town) which he ought and hath used to inclose.*

^p F. N. B. 134. d. ^q 12 H. 4. 22. ^r F. N. B. 134. i.
^s F. N. B. 134. k. ^t 22 H. 6. 22. Ante 81. b. ^u F. N. B. 128. b.

Writ of *Partitio facienda*, if Coparceners will not make Partition: But it doth not lie between Jointenants or Tenants in common, yet Partition made there by Assent is good; but where the Husband of one of the Coparceners happens to be Tenant by the Curtesy, such Writ lies for the other Coparcener against him, because he comes in of the Estate of his Wife; but he himself shall not have it against the Coparcener^w. The Form is, *If A. shall make, &c. summon B. &c. to shew wherefore, seeing the said A. and B. hold together and undivided three Acres of Land with the Appurtenances in I. of the Inheritance which was M.'s the Mother of the aforesaid A. and B. whose Heirs they are, she the same B. opposes making Partition thereof between them according to the Law and Custom of our Kingdom of England, and does not permit it to be made, unjustly, as it is said, &c.*

Statutes.

31 H. 8. cap. 1. *All Jointenants or Tenants in common of any Estate of Inheritance, in their own Right, or in Right of their Wives, are compellable to make Partition by Writ of Partitio facienda. After Partition made, every of them and their Heirs shall have Aid of the other and his Heirs to deraign the Warranty Paramount, and to recover for the Rate, as Coparceners after Partition.*

32 H. 8. cap. 32. *Jointenants or Tenants in common for Life or for Years, or where one or more holds for Life or for Years with another who hath an Inheritance or Freehold, shall be compelled to make Partition by Writ of Partition.*

This Partition shall not be prejudicial to any, his Heirs or Successors, or others than the Parties, their Executors and Assigns.

Hereupon, for Owelty of Partition, Things, which [b] otherwise may not, may be granted without Deed; as a Rent, Reversion, Seignior, Way, Advowson, &c. altho' it be a Rent seck and distrainable of common Right^x.

^w F. N. B. 62. Littlet. §. 247. Co. Litt. 169. a. 187. a. Littlet. §. 264. 5 Ed. 3. Fitz. Partition, 11. ^x Ante g. b. 10. a. 2 H. 7. 5. 11 H. 4. 3. 21 Ed. 3. 7. 28 H. 6. 2.

CHAP. VII.

Of Affize of Novell Disseizin, and Affize of Nufance.

MIXT *Actions* are such wherein along with the Thing itself, viz. the Freehold or Inheritance, Damages also shall be recovered, inasmuch as they are founded upon a *Tort* done to the Party himself; as in *Affize of Novell Disseizin*, and (which is in Nature of the same) *Affize of Nufance*; for in *Affize of Novell Disseizin* the Land itself and Damages shall be recovered against the Disseizor, and not in any other Case^r.

^a And these are returnable as well into the King's Bench, as into the Common Bench.

In both the Writ begins with, *A. bath complained to us, that B. unjustly and without Judgment bath disseized him, or did the Nufance.* And therefore it is properly called a *Plaint*, and not a *Plea*.^b So that upon Conu-
[97] fance of *Plea* granted to a Man, he shall not have Conu-
fance of *Affize*.

^c The Original Process is Attachment.

The *Affize of Novell Disseizin*^d is for the Disseizee against his Disseizor, of Land, Rent, or any Freehold whereof a *Præcipe quod reddat* lies, and also of Common of Pasture, or the like, without which the Freehold may not be manured. In Case of Land and Rent, it lies "as of Freehold"; but in Case of Common of Pasture the Writ shall be generally, *A. bath complained to us, that B. bath disseized him of Common of Pasture, Tur-
bary, or Piscary, &c.* But the Plaintiff in his *Plaint* ought to shew, that the Defendant claiming Common of Pasture in his Severalty with his Beasts, &c. And the Judgment shall not be, that he shall recover the
[97] Seizin of the Tenements, &c. but that he shall have

^r 8 Co. 50. a. ^a Bro Jurisdiction 121. for Affize of Novell
Disseizin. Bro. Mordancestor, 60. F. N. B. 177. 2 Inst. 24.
^b 9 H. 6. 27. b. ^c Old N. B. 106. F. N. B. 185. a.
^d F. N. B. 177. a. 178. 8 Co. 46. a. 2 Inst. 411. ^e Regist.
196. b.

and hold them in Severalty. For the Plaintiff himself is seized of the Freehold, and therefore he may not make his Plaint to be disseized of his Freehold. Also Affize lies of an Office, as of a Freehold, *at the Common Law*, because a *Præcipe quod reddat* lies thereof. And the *Statute Westminster 2. cap. 25.* which saith, *That for the future the Affize of Novell Disseizin shall lie as to Offices*, is to be intended, that it shall lie for the future without any Doubt, for it lay at the Common Law^f. But of Profits Apprender in a certain Place *Quod permittat* lies *at the Common Law*, and now by *Statute Affize* is given in lieu thereof.

In this Writ certain Day may be given, before the Justices of the Bench, or before the King, and out of Term^g. Certain, as until Thursday in fifteen, &c. but in *Affize of Mortdancestor*, the common Day, as in other Pleas. Also in *Affize of Novell Disseizin*, before the Justices or the King, a Man may put a Day out of Term, as until Thursday next after the Feast of St. Luke. Also before the King, they may give Day four Days. And this willeth the *Statute*.

Articuli super Chartas, cap. 5. *Which see before in Process of Real Actions.*

If the Writ be of Land, it commands the Tenement to be resealed of the Chattels which are in it, and the Tenement with the Chattels to be in Peace until, &c. And if the Party himself cannot be found, then his Bailiff to be attached^h.

The Form of the Writ of *Affize of Novell Disseizin* is thus, *A bath complained to us, that B. unjustly and without Judgment hath disseized him of his Freehold in N. within thirty Years now last past. And therefore we command you, that if the aforesaid A. shall make you secure of prosecuting his Claim, then that you cause the said Tenement to be resealed of the Chattels which were taken therein, and the Tenement itself with the Chattels to be in*

^f 2 Inst. 412.

the Writ.

^g Regist. 196. b. F. N. B. 177 d.

^h See Old N. B. 100. See the old Time of Limitation appointed in this Writ by Stat. Merton. cap. 8. but now altered by 32 H. 8. cap. 2.

Peace until, &c. in eight Days, &c. next to come. And in the mean time cause twelve free and lawful Men of that Neighbourhood to view that Tenement, and cause their Names to be put in the Writ. And summon them by good Summoners, that they be before us at Westminster (or before our Justices at Westminster) ready thereof to make Recognizance. And put by Gages and safe Pledges the aforesaid B. or his Bailiff, if he himself shall not be found, that he be then there to hear that Recognizance. And have there the Summoners, the Names of the Pledges, and this Writ. Witness, &c.

If the Writ be of a Rent Charge, or Rent Seck, all the Ter-tenants shall be named, and all the Land put in view, altho' he was disseized but by one Tenant^k.

- [b] ^a If the Lord distrain the Tenant very often, so that he cannot manure the Land, for Rent or Services, that is to say, such for which excessive Distress may be taken, as Rent-service, &c. but not for ^b Homage, Fealty, or Suit of Court, &c. for no Distress for them is excessive, be the Lord ^c mediate or immediate, the Tenant shall have an Affize, and the ^d Judgment shall not be that the Plaintiff shall recover Seizin of the Tenements aforesaid, for the Plaintiff himself is seized of the Freehold, but the Judgment shall be, that he shall have and hold the Land without manifold Distress.

The Plaint herein shall be in lieu of the Count.

The Form is, *And whereupon the said A. (the Plaintiff) complains that B. disseized him of, &c.*

The Defendant shall not vouch any Man if he be not named in the Writ, and is present when he is vouched, and will presently warrant^{*}.

† If the Defendant here, or in † Action of Trespass, pleads a Title in Bar, he shall give a Colour of Title to the Plaintiff; otherwise, viz. if he pleads no Title, as in Trespass to plead "his ^e Freehold, or "the Free-

^k 31 Aff. pl. 31. 32 Aff. pl. 10. F. N. B. 178. d. 6 Co. 58. b.
^a 27 Aff. pl. 51. 28 Aff. pl. 50. F. N. B. 178. i. 2 Inst. 414.
¹¹ Co. 44. a. ^b 11 H. 4. 2. 42 Ed. 3. 26. Bro. Distress, 4.
⁴ Co. 8. b. ^c 27 Aff. pl. 51. ^d 8 Co. 49. b. * Regist.
 196. b. † 10 Co. 90. † Post. 104. b. ^e 22 H. 6. 50.

hold^f of J. S. and that he entered by his Commandment; or when^e one prays in Aid of J. S. or of the King, or *Rege inconsulto*, altho' he intitl^hes himself by a Lease at Will, &c. there needs no Colour. Otherwise it is if he intitl^hes another to a Lease for Years, and justifies by his Commandment. So of a Thing whichⁱ destroys the Title of the Plaintiff, as in Affize, a Release, in Trespass of Goods, a Sale by a Stranger in Market overt, and that the Plaintiff took them out of his Possession, and he retook them, there there needeth no Colour.

Nor where a Man pleads to the Writ, and not in Bar, altho' that the Plea in truth goes in Bar, as in Trespass of Goods, that J. S. was possessed, and made Alice S. and J. D. his Executors, and died, Alice S. takes the Plaintiff to Husband, and was covert the Day of the Trespass, and afterwards died; so the Writ ought to be brought by J. D. who is yet alive, not named in the Writ, Judgment of the Writ, &c.^k

^l And in giving of Colour observe three Things;
1. That it be to the Plaintiff, not to a Stranger, nor to the Defendant; Not to a Stranger, as in Trespass that A. was seized, and infeoffed him, and J. S. claiming by Colour of a Deed of Feoffment of A. where nothing passed, &c. entered and infeoffed the Plaintiff, this is not a good Colour; for in a Stranger, Matters of Fact shall be always alledged, as to say, that J. S. infeoffed A. who infeoffed the Plaintiff, or that A. entered, and disseized J. S. and infeoffed the Plaintiff, &c.

^m So it shall not be given to the Defendant. As where the Defendant pleads "his Freehold; now if the Plaintiff say, that before the Defendant had any thing, A. was seized and infeoffed the Plaintiff, and the Defendant claiming by colour of a Deed of Feoffment of [98] A. where nothing passed, &c. entered upon him, and he reentered, this is not good.

2. ⁿ It shall be of such Possession whereof he may have this Action: As in an Affize to give colour to

^f 2 Ed. 4. 8. ^g 15 H. 7. 10. ^h 2 Ed. 4. 8. ⁱ 32 H. 6. 1.
^k 21 Ed. 4. 4. & 5. b. ^l 38 H. 6. 7. ^m 19 H. 6. 31. b.
ⁿ 32 H. 6. 6.

the Plaintiff of the Possession of the Plaintiff himself, and not of the Possession of his Ancestor, that is to say, by Deed of Feoffment made to himself where nothing passed, &c. But not of the Possession of his Ancestor, that is to say, by Deed of Feoffment made to his Ancestor where nothing passed, &c. for of such Possession of his Ancestor the Plaintiff shall not have an Affize.

3. ° The Colour shall be a Matter of Law, or difficult for Lay Men, otherwise he shall be put to take the general issue, that is, in Affize, to say, *Null Tort*, &c. in Action of Trespass, *Not Guilty*. As in Affize the Defendant saith, that he leased the Land to one for Life, and afterwards granted the Reversion to the Plaintiff, afterwards the Tenant for Life died, and the Plaintiff claiming the Reversion by force of the said Grant, where the Tenant never attorned, entered, &c. this special Matter is sufferable, because it is dangerous to plead *Null Tort*, &c. for Laymen will intend that the Reversion passed by force of the Grant without Attornment. Same Law is where the Tenant saith, that he leased to the Plaintiff for Life, and afterwards the Plaintiff surrendered, for Lay Men will not intend that a Surrender may pass by Parol. Same Law where the Tenant saith, that the Father of the Plaintiff leased to him for Term of Life of another, and afterwards released to him, and the Plaintiff supposing that his Father died seized of the Reversion, ousted him after the Death of *Cestuy que vie*, &c. because Lay Men do not understand how this Release enures by way of Enlargement, Feoffment, Confirmation, or Extinguishment. Same Law is, if the Tenant saith, that the Father of the Plaintiff infeoffed him, and afterwards he suffered the Father to occupy at Will, and the Plaintiff supposing that his Father died seized of the Reversion entered, &c. Same Law, to say, that the Plaintiff claiming as Bastard and eldest Son entered, because that Lay Men will intend that the eldest Son, altho' he be a Bastard, may inherit. Same Law is to say, that J. S. was seized, and infeoffed the Tenant, and the Plaintiff claiming

by a Deed of Feoffment made before, where nothing passed, &c. for Lay Men will intend this to be a good Feoffment, altho' no Livery be made.

But where the special Matter is not a Matter in Law, nor difficult for Lay Men, there the Tenant or Defendant shall take the general Issue. As, if the Tenant say, that he was seized until by the Plaintiff disseized, whereupon he reentered, or that he leased to the Father of the Plaintiff for Term of Life, or for Years, or for Term of Life of another, and the Plaintiff supposing that his Father died of an Estate in Fee-simple entered, &c. For in these Cases Lay Men know well enough that he is not a Disseizor. So, to say, that the Plaintiff claiming as younger Brother, &c. for every one knows, that the younger Brother may not inherit before the elder. And therefore, in these Cases, and all such, the Tenant shall take the general Issue. [b]

^p Where the Plaintiff in his Replication makes Title at large, that is, where he doth not traverse, nor confess and avoid the Bar, or meddle at all with it, the Plaintiff may join Issue upon the Title, as to say, *Let the Assize come upon the Title*, which is called, Pleading to the Assize at large. But ^a this is to be intended where the Title is by Matter in Deed, but not if it be by Matter of Record, or done in a foreign Country, for there it is not triable by Assize.

In Assize against many, if each taketh the intire Tenancy severally, and plead several Matters in Bar, or if the one plead ^a *Null Tort*, and the other in Bar (otherwise if one ^b pleads in Bar, and the other Jointenancy by Deed) the Plaintiff at his Peril shall chuse his Tenant, and then after Issue for the entierty, that, *viz.* the Tenancy shall be first inquired; and if it be found for the Plaintiff, then the other Issue shall be inquired; but if it be found against him, and no Title made against him who is Tenant in truth, the Writ shall abate ^{*}.

^p 15 H. 7. 13.

^a 5 H. 7. 29. b.

^r 33 H. 6. 36. Dy.

244. pl. 59.

^s 9 Ed. 6. Bro. Assize, 383.

^b 44 Ed. 3.

23. b.

^{*} 8 Aff. pl. 1.

No Repleader shall be here, if the Plaintiff hath disclosed sufficient Title; for in Assize no Land in certain is demanded, but the Assize only prayed, and therefore, where sufficient Title is disclosed, the Plaintiff shall have Judgment upon Seizin and Disseizin found for him; and no Repleader shall be, altho' the Tenant hath made a ^c vicious Bar, or hath ^d misjoined; otherwise it is ^e if the Plaintiff takes Issue upon an insufficient Bar.

^f Upon a Verdict given in Assize which is not perfect (whether it is not well examined by the Justices, or not fully inquired by the Jury) the Plaintiff shall have a Writ of Certificate of Assize to make the Jury to come again, and give a more perfect Verdict. ^g And this shall be sued in the same County where the Assize was sued; and may be as well before other Justices, as the Justices who took the Assize. If the King's Bench, or Common Bench be in the County where the Assize is taken, then this Writ may be sued there, and besides the Writ itself directed to the Sheriff, the Justices shall have a Patent made to them, as in the Assize itself.

No special Essoign lies here ^h.

Continuance shall be by "*The Justices are not yet advised*", and not by "*Day is given*".

Statutes.

[99] Westminster 2. cap. 25. *Of Estovers, of Woods, Profits apprender in Woods, of Nuts, and Acorns, and other Fruits to be gathered, of a Corody, Delivery of Corn and other Victuals and Necessaries, to be received yearly in a certain Place, Toll, Tronage, Passage, Pontage, Pannage, and the like, to be taken in a certain Place, keeping of Woods, Parks, Forests, Chases, Warrens, Gates, and other Bailiwicks, and Offices in Fee, an Assize shall lie for the future, and the Writ shall be de libero Tenemento.*

As before it lay for Common of Pasture, so hereafter it shall lie for Common of Turbary, Piscary, and the like Commons appendant to Freehold, or without Freehold by special Deed, at least for Life.

^c 14 H. 7. 12. b.

^d 5 H. 7. 29. b.

33 H. 6. 37. b.

^e 5

H. 7. 29. b.

^f Plowd. 92.

2 Inst. 415.

F. N. B. 181. b.

^g Ibid. 181. c.

^h 21 H. 6. 42.

ⁱ 22 H. 6. 12.

Where

Where Tenant for Years, or Guardian alien in Fee, as well the Feoffor as the Feoffee shall be taken for Disseizors, and Assize shall lie during the Life of any of them, and after their Deaths a Writ of Entry.

When one feedeth in the several of another, Assize shall lie by such Writ.

See there where the Disseizor named in the Assize vouches the Record, and fails at the Day.

Also for Certificate of the Record, where the Bailiff vouches it in the Absence of his Master.

And for Certificate of the Assize, where the Bailiff pleads to the Assize, and it is found against him, where his Master hath a Release, or other Matter of Writing.

Vide Westminster 2. cap. 18. 13 Ed. 1. Stat. de Mercatoribus, and 27 Ed. 3. cap. 9. That Tenant by Elegit, Statute Merchant, or Staple, shall have an Assize.

Westminster 2. cap. 46. They who have usurped Common within the Time that Mortdancestor runs, shall not have Assize, if they are deforced.

Vide Westminster 1. cap. 24. Assize given against an Escheator, who seizes without Cause, by Viriue of his Office.

Vide Westminster 1. cap. 48. Where the Guardian makes a Feoffment, the Heir shall have an Assize.

1 H. 4. cap. 8. Assize given against the Patentee, where the King grants the Land without Title found by Enquest, or otherwise, where the Entry of the King is not good by the Law; and if the Patentees pray in Aid of the King, a Procedendo shall be granted.

Vide Magna Charta, cap. 12. Assize of Novel Disseizin and Mortdancestor, shall be taken in the County where the Land is, and upon any Difficulty, shall be adjourned into the Bench. [b]

7 Rich. 2. cap. 10. Assize shall be granted of Rent due upon Tenements in divers Counties, to be holden in the Confinnes of the Counties, and thereupon the Assize shall be taken and tried by them of the said Counties, in the same manner as is done of Common of Pasture in one County appendant to Tenements in another County.

12 Ed. 2. cap. 1. Stat. of York. The Tenants in Assize of Novel Disseizin, may make Attornies.

Gloucester,

Gloucester, cap. 1. *The Demandant herein shall recover Damages against every one who is found Tenant after the Disseizin.*

Vide the Statutes of Redisseizin, Merton, cap. 3. Marlbridge, cap. 8. and Westminster 2. cap. 26. *In which Statutes, see also of Post Disseizin.*

^k *Affize of Nufance* lies upon a Nufance, by which the Freehold is impaired; for if one have only a Lease for Years in the Land, he shall not have an Affize of Nufance, but an Action on the Case. The Form is, *A. hath complained unto us, that B. unjustly and without Judgment hath heightened a certain Pool in C. in your County, to the Nufance of his Freehold in L. in the County of H. within 30 Years now last past; and therefore we command you, that if the aforesaid A. shall make, &c. then cause twelve free and lawful Men of that Neighbourhood to view that Pool (and in the other Writ, which shall be to the Sheriff where the Land lies, to which the Nufance is done, he shall say in the Writ, to view that Tenement) and cause their Names to be put in the Writ. And summon, &c. as in the Affize of Novell Disseizin.*

Statutes.

Westminster 2. cap. 24. *Of a Wall, House, Market, Affize of Nufance shall lie against the Alienee in this Form, A. hath complained to us, that B. and C. have levied, &c.*

[100]

CHAP. VIII.

Of Quo Warranto.

Prerogative.

THE King^c hath a special Suit in the King's Bench, most proper to try the Validity of a Franchise usurped upon him, or forfeited, which is called a *Quo Warranto*, because the Writ willeth, that

^k F. N. B. 184. g. Ante. 40. b.

Nufance. ^b The Alienee.

Quo Warranto.

^a He that levied the

^c Vide both the Statutes of

the Defendant shall shew by *what Warrant* he claims them; here ^a the Process is a Summons, and for Default, if he do not come the same Term that the *Quo Warranto* is returned, Judgment shall be, that the Franchise shall be ousted, if he hath it by Wrong and no Title, and he shall be fined, upon which Fine a *Capias pro Fine* shall issue, for it shall be in manner as if a Trespass was acknowledged; but if the King, or his Ancestors had granted the Franchise, and the Party now used, or mis-used it, the Judgment shall be, Seizure of the Franchise in the Name of Distress. And if he do not Replevy within forty Days, it shall be, forfeited for ever. So upon Default before Justices in Eyre, the Franchise shall be seized into the King's Hands, and he shall be answered of the Issues and Profits, and if he do not Replevy them during the *Eyre*, he shall lose the Franchise for ever.

Statutes.

18 Ed. 1. Stat. de Quo Warranto. *Pleas of Quo Warranto for the future shall be impleaded and determined in the Eyre of the Justices.*

30 Ed. 1. Stat. de Quo Warranto. *The Process shall be, "Cause to be proclaimed by what Warrant he claims, with Summons by forty Days.*

Upon Default, the Liberties shall be seized into the King's Hands in Name of Distress; and when he comes by Distress, he may replevy them, in which Replevin, he shall answer presently, altho' the Original Writ is not good, viz. where it appears, that he hath usurped upon the King. If he alledge that the Ancestor died seized, and this appears, the King shall have the Original Writ of Quo Warranto, where the Process shall be Summons and Venire Facias at the fourth Day, and in which he shall have reasonable Delays, as in personal Actions.

^a 15 Ed. 4. 7.

[b]

C H A P. IX.

Of Personal Actions.

Hitherto we have spoken of *real* and *mixed* Actions. *Personal* Actions, are such wherein only a Thing in the Personalty shall be recovered, Damages at least, for at the Common-Law, none but the Plaintiff should recover Damages.

And the whole consists in Damages, where the Thing itself is not demanded, as in Trespass, Covenant, Assumpsit, or the like, or where it may not be had, as in Detinue, if the Goods cannot be found, Damages shall be recovered to the Value of the Thing, over and above Damages for the detaining of it. Otherwise, where it may be had, for there Damages shall be had only for the detaining of it *. And therefore in Detinue for divers Things, the Damages shall be assessed severally by Enquest, to the intent, that if any of the Things may be delivered, the Certainty of the Damages thereof may be known, that it may be recouped; but otherwise it is in Waste †.

To all Personal Actions (Trespass, as well as others) these Things following do belong.

Being once suspended, or suspended as to one, it is gone for ever, and against all. b As if the Creditor be made Executor to his Debtor, and once administer; or if he take to Wife one who is Executrix to his Debtor, she having administered before, the Action of Debt is gone for ever. So a if two are bound in an Obligation to a Feme Sole, and she takes one of the Obligors to Husband, the whole Duty is extinct.

Several Actions of one Nature, as Debt and Detinue are, (for in a Writ of Detinue, the Warrant of Attorney, and also the Effeign, shall be “ *in Plea of Debt*; otherwise of Debt and Trespass, Debt and Account, or the like) may be joined in one Original,

† * 22 H. 6. 27. b. Portington.

Detinue, 48.

† 18 H. 8. 1.

* 1 Ed. 5. 5. b. Bro.

b 21 Ed. 4. 3. b.

c 11

H. 4. 83.

a 8 Ed. 4. 3.

21 H. 7. 29. b. Ante. 11. a.

and also one Original may be against many with several *Præcipes* †. And the Form is, *Take A. B. of, &c. and C. D. of, &c. to answer E. F. of a Plea, that the aforesaid A. render to him £10. and that the aforesaid B. render to him 40s. which they owe to him, &c.*

* Where the *Præcipe* is joint against many, then all the others, who are in the same Writ, shall be comprised with a *Simul Cum*, viz. to answer E. F. of a Plea, that he *together with* C. D. &c. render to him, &c. [101] But so it is not in a Writ against many by several *Præcipes*, for there several Writs shall be against each by himself, and the others shall not be put in the *Capias*, for every *Præcipe* is intended a several Writ by itself. But Note, that although the Process be so severed, yet all the Defendants may afterwards be joined in one Writ, if the Plaintiff will.

† In Personal Actions, which arise in respect of Possession in Common, Tenants in Common are in all Respects as Jointenants, that is, as to Joinder in Action, Survivor of Action, or the like, * for they ought to join in an Action of Trespass for a Trespass done upon their Land; in an Action of Account against their Bailiffs of their Woods, or the like; and ^b if one of them die, the Survivor shall have an Action for the whole. So ^c if Tenant for Life, Reversion to two Sisters, doth Waste, one Sister dies having Issue, and the Tenant again doth Waste, the Issue and her Aunt shall join in an Action of Waste, and the Aunt alone shall recover treble Damages for the Waste done in the Time of her Sister.

Summons and ^d Severance lies for Executors.

* If the Defendant appear, and afterwards the ^e same Term, or otherwise, after ^f Plea, or ^g Demurrer joined, make Default, this is peremptory, and shall lose the

† 3 H. 4. 13. Bro. Joinder in Action, 97.

188. b. pl. 18. Littlet. §. 315.

22 H. 6. 12. Bro. Joinder in Action, 35.

ib. 9. Tenants in Common 2. ib. 5.

38 Ed. 3. 7. 37 H. 6. 32. Bro. Tenants in Common. 18. Per

Prisor. ^e 45 Ed. 3. 3. Co. Litt. 198. a.

14. Bro. Summons & Sever. 8.

6. 39. 41.

^g 38 H. 6. 33. b.

^c Rast. Entr.

^a Co. Littlet. 198. a.

43 Ed. 3. 23. Bro.

^b Co. Littlet. 198. a.

^d 48 Ed. 3.

^f 7 H.

^e Ante. 67. b.

^h 18 Ed. 4. 7.

Action;

Action; and such Default may not be saved whatever excuse he hath, as fear of Waters, Imprisonment, or the like, &c. For to appear and plead, and not to maintain the same, is a *Nilil dicit*.

Upon his Default after Issue joined, the Jury shall be taken, which we call, Taking the Inquest by Default. And this in Actions of Trespass always, whatever the Issue is, whether upon ^k Release, ^l Justification, or the like; so in ^m Debt, Detinue, Account, and such Actions as are for a Thing in certain, if the Issue be taken upon Matter in Fact only, as ⁿ Payment, ^o Durefs, &c. but if the Issue be upon Matter in Writing, as Acquittance, Release, or the like, there the Plaintiff^p may pray Judgment if he will, but if he do not pray Judgment, then the Inquest shall be taken by Default, as in Actions of Trespass.

^q The Writs of Execution upon Recovery in a Personal Action, are *Levari Facias*, and *Fieri Facias*.

* *Levari Facias*, to have Execution of his Land and Chattels. The Form is, *Cause the Money aforesaid to be levied of the Lands and Chattels of the aforesaid (Defendant) so that you may have it in, &c. such a Day, to be delivered to the aforesaid (Plaintiff)*. And this containing Words^r, that the Sheriff ought to levy the Money of his Land and Chattels, it seems that he may take the Rents payable by the Tenants in Execution of Debt, but not seize the Land and deliver it to the Party.

[b] *Fieri Facias*, of his Chattels only.

The Execution, as to the ^a Land, shall be of whatever Land the Party had the Day of the Judgment given: As to the ^b Chattels, (though it be ^c a Lease for Years) it shall be only of those which he hath the Day of the Execution sued; so that if the Party sell his Goods *bona fide* after Judgment, and before

¹ Bro. Default, 58. ^k 34 H. 6. 24. ² H. 4. 23. Bro. Inquest, 11. ^l 9 H. 5. 15. ^m 5 Ed. 4. 6. b. ⁿ 1 H. 7. 1. ^o Ibid. ^p 9 H. 5. 13. ^q 42 Ed. 3. 1. b. ^r 3 Co. 12. a. ^s O'd N. B. 165. ^t Plowd. 441. ^u O'd N. B. 165. ^v 42 Ed. 3. 11. ^w 2 H. 4. 14. ^x Ibid. ^y O'd N. B. 165. ^z 8 Co. 171. b. & Ante. 74. b. like Point.

the Writ of Execution sued, the Goods are not liable to the Execution.

Statutes.

Westminster 2. cap. 18. *Upon Recognizance, or Debt, or Damages recovered in the King's Court, the Plaintiff may choose that the Sheriff shall deliver to him all the Chattels of the Debtor, (saving his Oxen and Beasts of his Plough) and the Moiety of his Land, until the Debt be levied by reasonable Price and Extent; of which the Plaintiff may have Assize and Redisseizin.*

1 Jac. 1. cap. 13. *Where a Man in Execution is put at large by Privilege of Parliament, a new Execution may be sued after that the Privilege of the same Session shall cease.*

32 H. 8. cap. 5. *If Land, which is in Execution upon Recovery of Debt, or Damages upon a Statute, or Recognizance be lawfully divested or evicted, the Party shall have a Scire Facias out of the same Court, against the Tenants of the Land, liable to the said Execution, returnable 40 Days after the Teste, and upon that (that is to say, if the Defendant makes Default, or do not shew sufficient Cause) a Re-extent for the levying the Residue.*

After the Year, he is put to an Action of Debt; whereupon was made the Statute of Westminster 2. cap. 45. which see above in Scire Facias^d.

CHAP. X.

[102]

Of Actions of Trespafs.

PERSONAL Actions, are *Actions of Trespafs, or other personal Actions.*

Actions of Trespafs, are Actions of Trespafs with Force, (properly called Actions of Trespafs) or Actions of Trespafs upon the Case. Which Actions, inasmuch as they concern as well the King, as him to whom the Trespafs is done, may be sued in the King's Bench, or Common Bench, at the Election of the Party^e.

^d Ante. 76. b. 82. a.

^e 9 Co. 50. b.

In *Actions of Trespass with Force*, the Original Process is Attachment, and Distress infinite, and upon the Attachment or Distress returned *Nihil*, three *Capias's* shall issue, and afterwards Process of Outlawry^f.

Statutes.

Vide Westminster 1. cap. 45. Upon Default at the Attachment, Grand Distress shall issue, and if he do not come at another Day to save his Default, the King shall have the Issues.

Westminster 2. cap. 11. *Capias* and Process of Outlawry given in Account.

25. Ed. 3. cap. 17. On Debt, Detinue, and Replevin.

7 H. 5. cap. 1. In Forgery of false Deeds.

19 H. 7. cap. 9. The like Process given in Action upon the Case, as in Trespass or Debt.

23 H. 8. cap. 14. The like Process given in Trespass upon 5 Rich. 2. as in Trespass; and the like Process in Writ of Annuity and Covenant, as in Debt.

Vide 5 Ed. 3. cap. 12. Upon Outlawry, where Damages are recovered, no Pardon shall be granted, until the Plaintiff be agreed with for his Damage.

[b] Nor upon Outlawry in Process, until he render himself to Prison before the Justices where the Exigent issues. And *Scire Facias* shall issue to the Plaintiff, upon which they shall plead upon the first Writ Original, as if no Outlawry had been pronounced. If the Plaintiff being testified warned, makes Default, the Pardon shall be allowed.

6 H. 8. cap. 4. Upon every Exigent, at the Suit of the King, or other, in any personal Action, where the Defendant is named of another County, or late of another County, than where the Exigent is awarded, a Writ with Proclamation shall issue in the County, where the Defendant is so named, if the King's Writ runs there: Otherwise to the County next adjoining to that where he is named.

Being named of, or late of London, or Middlesex, the Writ of Proclamation shall issue in the County where he is dwelling, if the King's Writ runs there; otherwise to the County next adjoining.

^f F. N. B. 92. a.

Which

Which Writ shall contain, that the Sheriff make three Proclamations, two in full County Court, the third in General Sessions, that he render himself to the Sheriff of the Foreign County where the Exigent is awarded. And such Writ shall be returned at the Day of Return of the Exigent.

Every Outlawry in a Foreign County, where such Writ with Proclamation is not so awarded and returned, shall be avoided by Plea.

31 Eliz. cap. 3. *In every Personal Action, upon the Exigent, Proclamation shall issue out of the same Court, with the same Day of Date and Return directed and delivered of Record to the Sheriff of the County, where the Defendant at the Time of the Exigent is dwelling. Which Writ shall contain, that the Sheriff shall make three Proclamations, one in open County Court, another at the General Quarter Sessions, and the other a Month at least before the quint. exact. at or near the most usual Door of the Church, or Chapel of the same Town, or Parish, where the Defendant at the Time of the Exigent is dwelling; and if he dwell out of any Parish, then at such Place of the Parish, in the same County next adjoining to his Habitation, upon a Sunday immediately after Divine Service and Sermon, if there be any Sermon, and if there be no Sermon, then immediately after Divine Service. All Outlawries, where no Writ of Proclamation is so awarded and returned, shall be void.*

Before Allowance of any Writ of Error, or Reversing [103] of any Outlawry be had by Plea or otherwise, for want of Proclamation, the Defendant in the Original Action shall put in Bail, not only to appear and answer to the Plaintiff in a new Action for the Cause in the first, but also to satisfy the Condemnation, if the Plaintiff shall commence his Suit within two Terms^e.

A Capias^a does not lie against a Peer of the Realm in such Case, but against a ^bKnight it lies, for a Man may be a Knight, who hath not any Freehold,

^e Vide 4 & 5 W. & M. cap. 18. & cap. 22. ^a Hobart 61.
6 Co. 52. b. 9 Co. 49. a. 68. a. Style, 222. Moor, 767.
Croke's Argum. 106. ^b 26 H. 8. 7.

but not an Earl or Baron by common Intendment. But if he hath not any Thing in the County where he is sued, the Party shall have an *Elegit* upon a *Tes-tatum*, in any County where he hath Assets. But^c upon Contempt, as Rescous, or the like, it lies against a Peer of the Realm, and this is for the Disturbance of the Law.

Upon Judgment herein *Capias ad Satisfaciendum* lies within the Year, to take his Body in Execution for Satisfaction of Damages. ^d And this doth not lie in any real Action, as in a Writ of Dower, or other *Præ-cipe quod reddat*, nor ^e at the Common Law in Debt, Detinue, Account, but in Action of Trespas, or the like.

The Form is, *We command you, that you take I. of C. and him safely, &c. so that you may have his Body before, &c. to satisfy G. of K. as well of 20 s. which the same G. in our Court, &c. recovered against him, as of 20 s. which were adjudged to him in our said Court for his Damages, which he sustained by reason of the detaining the Debt aforesaid.*

In this, Process of Outlawry shall issue upon the first *Capias*, for if he be taken by the *Capias*, he shall pay a Fine to the King for the Trespas adjudged against him *.

The Actions of *Trespas with Force*, besides Rape, which is now made Felony, whereof Appeal lies, are upon corporal Damage, Battery, False Imprisonments, Assault, Lying in Wait, and then upon Trespas done in Land, or one's Goods.

Statutes.

Gloucester, cap. 8. *None shall for the future have Writs of Trespas before Justices, unless he swear by his Faith, that the Goods carried away were worth 40 s. at least.*

And if he complain of Beating, he shall swear by his Faith, that his Complaint is true.

^c 1 H. 5. 14. 27 H. 8. 12. Hob. 61. 2 H. H. P. C. 199. ^d 8 R. 2. Fitz. Execution, 164. 2 H. 4. 6. ^e 12 Co. 12. a. b. Co. Litt. 290. b. * 40 Ed. 3. 25. 49 Ed. 3. 2.

And

And Defendants may make Attornies in such Pleas where Appeal lieth not.

The Form of the Writ of Battery is, *If A. shall make you secure of prosecuting his Claim, then put by Gages and safe Pledges B. that he be before us in eight Days, &c. wheresoever, &c. (or before our Justices at Westminster in eight Days, &c.) to shew wherefore with Force and Arms he made an Assault upon him the said A. at N. and beat, wounded, and ill treated him, so that his Life was despaired of, and other enormous Things to him did to the great Damage of him the said A. and against* [b]
** our Peace. And have, &c.*

The Form of the Writ of False Imprisonment is, *If A. shall make, &c. then put, &c. B. &c. to shew, &c. wherefore with Force and Arms he made an Assault upon him the said A. at N. and him wounded, imprisoned, and ill treated; or if he imprison him, until he make a Fine for his Deliverance, then the Form is, And detained him in Prison there, until he had made a Fine (for so much) with the said B. for the having his Delivery, and other enormous Things, &c.*

And it is not material whether he be wounded or not, for the Form of the Writ is such; but the Damages shall be encreased for the same, if he do recover †.

The Form of the Writ of Assault is, *Supra, viz. Wherefore, &c. he made an Assault on him the said T.*

The Form of the Writ for Lying in Wait is, *Put &c. B. &c. and C. &c. to shew, wherefore with Force and Arms they beset the House of him the said A. at H. and his Men and Servants, being out of the said House, would not permit to enter the same House, to do therein for the Service and Profit of him the said A. and certain others, his Men and Servants, being therein, would*

* If he Counts of a Trespass done part in another King's Time, and part in the present King's Time, the Writ shall be, "against the Peace of the late Lord the King, &c. and of the Lord the King now, &c." and it shall be good, reddendo singula singulis. 21 H. 4. 15. On a Writ "against our Peace" only, he shall not recover Damages for a Trespass done in the Time of another King.

† F. N. B. 86. r.

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not permit to go out of the same House, for a long Time, to do the Business of him the said A. there, by which he the same A. for a long Time hath lost the Service of his said Men and Servants, and other enormous Things, &c.

The Form of the Writ upon Menace is, *If A. &c. put, &c. B. &c. to shew wherefore with Force and Arms, he so greatly threatened the same A. at D. of his Life, and maiming of his Members there, and so many Injuries and Harms to him there did, that he the said A. durst not for a long Time go openly about his Business there, for fear of Death and the maiming of his Members, by which means his Business for so long Time remained neglected, and other, &c.*

When a Man is in fear or doubt of any corporal Damage, by Reason that another threatens to kill him, beat him, or assault him, or to burn his Houses, he shall have a Writ *de securitate pacis* to be secured, that the Party shall keep the Peace against him. By the ancient Course, he ought to make Oath upon a Book, before a Master of the Chancery; but now they use to sue forth such Writs by their Friends without Oath^b.

The Form of this Writ is altered, since the Statute 1 Ed. 3. cap. 16. which appoints certain Persons to keep the Peace, and it is called a *Supplicavit*, sometimes directed to the Justices of the Peace, and to the [104] Sheriff, and sometimes to the Sheriff only. *A. hath besought us, that whereas he is grievously and manifestly threatened by E. of his Life and maiming of his Members (or of burning of his Houses) we would provide for the Security of him the said A. in this behalf: Therefore we command you, &c.*

In an Action of Trespass transitory, although the Defendant justifies by any special Matter, as in^a Trespass of Goods, by the Commandment of I. S. to whom the Property belongs; in Assault^b and Battery, or^c Appeal of Maihem, that he did it in his own Defence, and that the Plaintiff made the first Assault; in False Imprisonment, because he was^d Constable of

^a F. N. B. 79. g.
^c 41 Aff. pl. 21.

^a 19 H. 6. 67.
^d 5 H. 7. 6.

^b 34 H. 6. 16.

the Town, and the Plaintiff broke the Peace, or for an Arrest upon Suspicion of Felony, or by the ^e Commandment of I. S. to seize the Body of the Plaintiff; in Ward, by Reason that his Ancestor, whose Heir he is, held of I. S. by Knight's Service, &c. yet the Plaintiff may take Issue, that it was done of the Defendant's own Wrong, without answering to the special Matter. But if the Justification be by Matter of Writing, or Record; as in False Imprisonment by a ^f Warrant of a Justice of Peace to arrest him; or by a ^g *Capias*, which came to him as Sheriff, to take the Body of the Plaintiff; or if it be by any ^h Title, or ⁱ Licence of the Plaintiff himself, there *de son Tort Demesne* is no Plea, but the special Matter shall be answered. So always in a Trespass local, as for breaking down his Close, &c. if the Defendant entitles a Stranger to the Land, whether it be to a Freehold, or to a Lease for Years in the same, and justifies by his Commandment. So in Replevin, which is Real, the Title or special Matter shall always be traversed.

^k In Trespass (and so in ^l Replevin, where Justification is made for Damage Feasant, for there it is meerly in the Personalty) if the Title of the Land come in Question, Tenant for Years (or Bailiff in Replevin) shall have Aid ^m after Issue joined, not before, but Tenant for ⁿ Life shall never have Aid.

An Action of Trespass done in Land, lies for him that hath the actual Possession of it, for of a Trespass done after the Death of his Ancestor ^o, and before the Heir enters; after the breaking of the Condition ^p, and before Entry for the same, where a Lease for Years

PREROGATIVE.

Aid shall be had of the King before Issue joined only, 5 Ed. 4. 1. Fitz. Aid de Roy, 30. Although the King was seized in his natural Capacity (as in Right of his Duchy of Lancaster, or the like.) P. 3. H. 6. Per Plowd. 216, 217.

^e 22 Aff. pl. 85. ^f 21 H. 6. 5. b.
^g 5 H. 7. 6. ^h 44 Ed. 3. 18. b. ⁱ 22 Aff. pl. 8.
^j 12 Ed. 4. 10. b. ^k 14 H. 7. 6. ^l 46 Ed. 3. 11. b.
^m 46 Ed. 3. 11. b. ⁿ 14 H. 7. 6. ^o 4 H. 6.
^p 10. ^q 11 H. 7. 22. Per Vavasor. Plowd. 142. ^r Ibid.
 Kelwey, 163. a. 37 H. 6. 18. Bro. Surrender, 21.

is made, reserving Rent upon Condition to be void if the Rent be not paid; or after Michaelmas, and before the Lessee enters, where a Lease for Years is made, to commence at Michaelmas; no Action lies for the Heir in the first Case, for the Lessor in the second, nor for the Lessee in the third, because that they were not ^a seized in Deed of the Land at the Time of the Trespass done; yet the Lessor, in the second [b] Case, might have made a new Lease ^r before his Entry, for the first Lease was meerly void; and the ^a Lessee, in the last Case, might before Michaelmas grant his Term over.

The Form is, *If A. &c. put, &c. B. &c. to shew wherefore with Force and Arms, the Close of him the said A. at N. he broke, (and if the Case so be) cut down his Trees there lately growing, (and so every Trespass done upon the Land, may be inserted in the Writ) and other, &c.*

And so in infinite Forms, as “*Wherefore he entered his Wood at N.*” “*Wherefore he entered his Warren at N.*” “*Wherefore he broke the Park of him the said A. at N. and entered his Free Chase at F.*” And many other Forms.

In an ^b Action of Trespass done in Land, if the Defendant pleads a Title in Bar, he shall give Colour of Title to the Plaintiff, as in the Assize of Novell Disseizin. Vide the Cases there, Ante 97. b.

If the Defendant justifies in another Place than the Plaintiff intends, he in this Replication shall make a new Assignment, that is to say, shall assign the Place more certainly; as if the Defendant justifies in *White Acre* as his Freehold, the Plaintiff may assign the Trespass in *Black Acre* ^{*}.

The Form of a new Assignment is, *And the aforesaid A. says, that he ought not to be precluded, &c. because he says, that the Close aforesaid, and also the Place in which the Trespass aforesaid was done are, and at the Time of the aforesaid Trespass done, were one hun-*

^a Perk. § 16.
Grants, 103.

^r Plowd. 142, 138.

^a 22 Ed. 4. 37. Bro.
^b Ante 97. b. ^{*} 27 H. 8. 7.

dred Acres of Land in the aforesaid Town of C. called B. other than the aforesaid five Acres in the Bar of the aforesaid T. (the Defendant) specified: Wherefore of the aforesaid T. for the aforesaid Trespass done in the said one hundred Acres of Land called B. other than the said five Acres of Land in the Bar aforesaid specified, he prays Judgment, and his Damages, &c. And then the Defendant shall plead all *de Novo*; viz. And the aforesaid T. as to any Trespass supposed to be done in the aforesaid hundred Acres of Land, saith, &c. And so pleads not Guilty, or a Justification, or the like.

The Form of Trespass *de Bonis Asportatis* is, * If A. &c. put, &c. B. &c. to shew wherefore with Force and Arms, he took and ^ccarried away three Horses, which were his the said A's. of the Price (so much as the Price is) found at S. and also took and ^dcarried away his Goods and Chattels to the Value of one hundred Pounds, and one hundred Pounds of Money, in Money told there found, and other, &c.

Special Writs of Trespass of Goods, are the Writ of *Rescous*, and the Writ *de Parco Facto*: Both are for the wrongful taking of Goods which a Man hath distrained, whether Beasts, or other Things, and whether it be for Damage Feasant, or for Rents and Services in Arrear. I say, Special Writs of Trespass, in which he that distraineth hath no Property or Possession in the Distress^e.

Writ of *Rescous*, when they are taken before that he hath impounded them; but it is material^f, that [105] he have the Possession of the Beasts or Things so rescued from him, for if he be disturbed before that he hath attached or distrained them, no Writ of *Rescous* lies, but an Action on the Case. The Form is, If A. &c. put, &c. B. &c. to shew, wherefore, whereas he the said A. took certain Beasts of the said B. and would have impounded them there, according to the Law and Custom of our Realm of England, the aforesaid B. with Force and Arms rescued the Beasts aforesaid, and other, &c.

* V. F. N. B. 87. m. ^c Abduxit, for a live Thing. ^d Asportavit, for a dead Thing. F. N. B. 88. b. Dyer, 121, pl. 15.
^e 26 H. 7. 1. ^f 21 H. 7. 40. F. N. B. 102. f.

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¶ Writ *de Parco Frañto*, when they are taken out of the Pound, be it a common Pound, or other Place, being a lawful Pound, and whether he that so breaks the Pound, be Proprietor of the Beasts, or not. And it lies for him that distrains, not for him that owneth the Close, that is to say, where one distrains and puts the Beasts by License into the Close of his Friend, for it is not the Pound of the Owner of the Soil, but of him who distrained; and the other shall have Action of Trespass, *Quare clausum fregit*. And although the Beasts are put in the Pound, yet he that distrains hath not any Property or Possession, for the Pound is an indifferent Place between them, and the Owner of them is but restrained from the Occupation of them until he pay his Rent, or the like^b.

The Form of the Writ of *Parco Fañto* is, *If A. &c. put, &c. B. &c. to shew, wherefore, whereas the said A. took the Beasts of the aforesaid B. and impounded them there, according to the Law and Custom of our Realm of England, the aforesaid B. with Force and Arms broke that Pound, and other Wrongs, &c.*

To this Place also is to be referred the Writ of *Ravishment of Ward*, when the Heir, whose Marriage belongs to another, is ravished; and this isⁱ a meer Action of Trespass, in which Process of Outlawry^k lies at the Common Law, and he shall recover^l the Value of the Marriage. But there is another Writ of *Ravishment of Ward* given by the *Statute of Westminster 2. cap. 35.* which was^{*} not at the Common Law, and in this the[†] Ward himself shall be recovered, if he be unmarried, or the Value of the Marriage, if he be married.

Statutes.

Vide Merton, cap. 6. *The Punishment in Ravishment of Ward.*

Vide Westminster 2. cap. 35. *A greater Punishment, And by the same Statute Westminster 2. Such Writ is given. If A. shall make, &c. put, &c. B. that he be, &c.*

¶ F. N. B. 100. e. ^h 20 H. 7. 1. ⁱ 29 Aff. pl. 35.
Kelwey, 21. a. ^g Co. 72. b. ^k 9 Co. 78. b. ^l Hob. 94.
* F. N. B. 139. i. [†] 21 Ed. 3. 44. 8 Ed. 3. 42. b.

to shew, wherefore he ravished and carried away such an one, Heir of, &c. found at such a Place, being under Age, the Marriage of whom belongs to him the said A. against the Will of him the said A. and against our Peace, &c. If the Heir be in the same County, this Clause shall be added, and do you diligently enquire where he the Heir is in your Bailiwick, and take him wheresoever he shall be found, and keep him safely, &c. so that you may have him before, &c. to be restored, to which of them the said A. and B. he ought to be restored.

Upon Nihil to the Distress, Outlawry lies.

If the Heir be married, or carried into another County, then such Writ^m shall issue, A. hath complained unto us, that B. hath lately ravished such an one, Heir of, &c. being under Age, and being in his Wardship at such a Place in such a County, and hath carried him from that County, unto such a Place in your County. And therefore we command you, that you take the said Heir wheresoever, &c. as in the Writ above.

Notwithstanding the Death of the Heir before he may be restored, yet the Plea shall proceed.

If the Plaintiff or Defendant die, there shall be a Resummons, and that against the Heir of the Defendant if the Executor hath not Assets.

C H A P. XI.

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Of Actions of Trespas on the Case.

AN ACTION of Trespas on the Case, is for a Trespas committed against the Peace, be it a Wrong or a Deceit. For such Writ concludes against our Peace. And they are called Actions upon the Case, because they are divers, and in fundry Forms, as the Case is, whereof no constant Rule may be givenⁿ.

The Writ itself here ought to comprehend all the Matter of Substance, that is to say, that which is tra-

^m Note, The Original Writ ought to be brought in the County where the Ravishment is supposed, and not in the County to which he is esloigned. Dyer, 289. b. ⁿ 9 Co. 50. b. F. N. B. 92. c.

verfable, as fully as the Count, except it be the Day, the Quantity of the Land, or the like °.

Statutes.

Westminster 2. cap. 50. *A Man shall have a Writ upon his Case, where Remedy is given by a Statute.*

36 Ed. 3. cap. 9. *Accord*

The original Process is Attachment and Distress infinite ^p.

The special Writs herein are the Writ of Conspiracy, and Writ of Deceit, viz. that which is in Nature of Trespass; for there is a Writ of Deceit of another Nature, whereof shall be spoken hereafter.

[b]

CHAP. XII.

Of other personal Actions.

THE *other personal Actions* are such as are not in Nature of Trespass.

* The original Process in them is as in Actions in the Realty before, that is to say, Summons, Attachment, and Distress °.

In personal Actions, where the Thing itself shall be recovered, as ^r *Right of Ward*, ^s *Quare impedit*, ^t *Detinue*, if divers bring several Writs against the same Person, in the same County, and for one same Thing (altho' they vary ^u in Time and Place of Delivery (for the Place is not material, being all in one County) so that ^w they do not vary in the Substance of their Declaration, as where one declares of a Chest sealed, without alledging any Charter in certain, and the other alledges a Charter in certain) they ^x shall all interplead together, that is to say, the others at the Prayer of the Defendant shall answer to him that brought the first Writ: Wherefore they ^y shall have *Same Day*, if the Writs be returnable at several Days.

° 38 H. 6. 9. b.

^p F. N. B. 100. d.

^q 22 H. 6. 38.

^r 3 H. 6. 44.

^s 19 H. 6. 68.

^t 33 H. 6. 25.

^u 8 H. 6. 30 b.

^v Ibid.

^w 33 H. 6. 25. b.

^x 8 H. 6. 30. b.

^y 33

H. 6. 25.

The Form is, after the several Declarations of both, (that is to say, in Detinue by A. and B. against C. of a Box, or the like) *And the aforesaid C. by, &c. comes, and producing here in Court the Box aforesaid, &c. being ready to deliver the same to which of the said A. and B. the Court of the Lord the King here shall consider, prays that the same A. and B. here at this Day, &c. together appearing may interplead to which of them the Box aforesaid, &c. of Right ought to be delivered. And thereupon the aforesaid A. (he who brought the first Writ) prays against the aforesaid C. the Delivery of the Box, &c. and the aforesaid B. says that the Box aforesaid, &c. ought to be delivered to him, and not to the aforesaid A. Because, &c.* And so makes Answer to the Declaration of A.

And the Reason of *Interpleader* in Detinue, or the like, is, because otherwise if one recovers against the Defendant, yet the Action of the other is not abated, but he may proceed: Otherwise it is in a real Action, as *Formedon, Præcipe quod reddat, &c.* Such personal Actions are,

In Case of Ward.

[107]

1. Upon Deforcement of the Heir or Land, the Writ of *Right of Ward*; if of the Heir, that is to say, of his Body, ^a it lies as well for Guardian in Socage, as in Chivalry; if of the ^b Land, for Guardian in Chivalry only; for Guardian in Socage is accountable to the Heir for the Land, which proves that he hath no Right to the Land, but as Bailiff.

This Writ, because it is by reason of a Seigniory, is sometimes in nature of an Action in the Realty; for ^c Summons and Severance lies in it, the Defendant ^d may vouch, &c.

The Form is (if of the Heir) *Command A. that he render to B. W. Son and Heir of E. the Wardship of whom belongs to him the said B. for that the aforesaid E. held his Land of the aforesaid A. (or of J. the Father of the aforesaid A. whose Heir he is) by Knight's-service (or if it be for the Grantee of a Ward, "by reason of a Demise,*

^a F. N. B. 139. i. Ed. 3. 22. b.

^b Ibid. 139. h.

^c 5 Ed. 3. 180. 42

^d 11 Ed. 4. 11. 46. Ed. 3. 25.

which

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which R. of whom the aforesaid E. held his Land by Knight's-service, thereof made to the said B.)

If of the Land, Command A. that he render to B. the Wardship of one Yard-land with the Appurtenances in R. which belongs to him, because, &c.

If of the Land, and the Heir, Command A. that he render to B. the Wardship of the Land and Heir of C. which belongs to him the said B. for that, &c.

Statutes.

Marlbridge, cap. 7. Upon Default at the Grand Distress, Distress with Proclamation shall issue, with half a Year between the Teste and Return, so that three Proclamations may be at three Counties, and upon Default at the Grand Distress with Proclamation he shall recover the Wardship and Damages.

Westminster 2. cap. 35. If any of the Parties die, pending the Writ of Right of Ward, there shall be Resummons, and the same Process as in the Statute of Marlbridge above.

28 Ed. 1. Of Wards and Reliefs, declares the Common Law in what Case the Writ of Right of Ward lies, that is to say, 1. Where a Man who holds in Chivalry dies, the Lord shall have it for the Ward and Marriage. 2. The Lord by Priority shall have it for the Marriage. 3. The Lord who hath the Land, and not the Heir, shall have this Writ for the Heir.

2. As to the Wardship of Land only, ^f the Writs of Ejectment of Ward, and of Intrusion of Ward; but none of them supposes Force.

The Writ of Ejectment of Ward is upon such Ejectment, viz. for the Guardian in Chivalry, ^g or Socage, when a Stranger ejects him ^h of the Land; for this is an Ejectment of Ward, as we have said before.

[b] *The Form is, If A. shall make, &c. then summon, &c. B. &c. Wherefore, whereas the Wardship of one Yardland with the Appurtenances in D. until the lawful Age of J. Son and Heir of C. belongs to him the said A. for that, &c. And be the said A. was for a long time in full*

^e 24 Ed. 3. 33. Bro. Gard. 50. ² Inst. 114. ^f Ante 48. b.
^g Ante 48. b. F. N. B. 140. c. ^h Dy. 369. pl. 56.

full and peaceable Seizin of the said Wardship, be the said B. forcibly ejected him the said A. from the Wardship aforesaid, the said Heir being within Age.

Statutes.

Westminster 2. cap. 35. *In the Writ of Ejectment of Ward shall be done as in the Writ of Right of Ward by the same Statute. See it above.*

* Writ of Intrusion of Ward is upon such Intrusion, and lies for the Guardian in Chivalry, *when the Heir enters into the Land, and ousts him; for this is Intrusion of Ward, as we have said † before, whether it be during the Nonage of the Heir, or after his full Age. If the Heir intrude, and deny the Value of the Marriage also, then this Writ of Intrusion of Ward may be for both.

The Form is, *If A shall make, &c. then summon B. Son and Heir of C. &c. to shew wherefore, whereas the Wardship of the Manor of F. with the Appurtenances, until the lawful Age of the Heir aforesaid belongs to him the said A. For that, &c. And the same A. was a long time in full and peaceable Seizin of the same Wardship, the aforesaid B. being within Age hath intruded himself into the Land aforesaid, and detains from the said A. that Wardship, to the Damage, &c.*

|| To have the Benefit of the Marriage, the Writ *de valore Maritagii* lies for the Guardian in Chivalry, when the Heir at full Age refuses to satisfy him for his Marriage; wherefore in the Writ thereof there are not any Words of the Intrusion of the Heir into the Land.

The Form is, *If A. shall make, &c. then summon, &c. B. Son and Heir of C. &c. to shew wherefore, whereas the Marriage of the aforesaid B. belongs to him the said A. for that the aforesaid C. held his Land of him by Knight's-service, and be the said A. hath tendered to the aforesaid B. while he was under Age, a competent Marriage, be the said B. refusing that Marriage, when he hath now come to his full Age refused to satisfy the aforesaid A. for the same Marriage, and yet doth refuse, &c.*

In Case of Land.

When Lessee for Years is ousted, are *Ejectione Firmæ*,

* F. N. B. 141. e.

† Ante 48. b.

|| F. N. B. 141. f. and

and *Quare ejecit infra Terminum*, to be brought during the Term. But ¹ they do not lie upon a Lease for Years made of Beasts or other Chattels.

In ^k both the Term itself shall be recovered, if it be not expired, and the Execution is by ^{*} *Habere facias possessionem*.

The Writ of *Ejectione Firmæ* is upon such Ejectment, viz. ¹ when any one, whether the Lessor or a Stranger, ousts him; for this is an Ejectment, as we have ^m said before.

[108] This Writ always ⁿ includes in it a Trespass with Force also. And therefore the Process is as in Action of Trespass, viz. ^o Attachment, Distress, and Process of Outlawry.

The Form is, *If A shall make, &c. then put B. that he be* (such a Day) *to shew wherefore with Force and Arms he entered into the Manor of J. which C. demised to the said A. for a Term which is not yet passed, and the Goods and Chattels of him the said A. to the Value, &c. found in the same Manor, took and carried away, and ejected him the said A. from his Farm, and other Wrongs, &c.* Note, this Clause (*and the Goods ^p and Chattels, &c.*) shall be put in the Writ, where the Ejectment is supposed of a Manor, because that the Law intends the same to be stored with Chattels: Otherwise it is of other Lands.

The Writ of *Quare ejecit infra Terminum* lies upon a Deforcement of his Farm, that is to say, when the Lessor enters, and infeoffes another, be it in Fee or for Life, there this Writ lies against ^q the Feoffee or Lessee for Life, for they deforce him of his Farm, as we have said before. And in such Case *Ejectione Firmæ* does not lie against the Feoffee or Lessee for Life, for that he is not the Person who ousts him, but his Feoffor; and this is the Reason for which this Writ was devised. And therefore this Writ ^r doth not suppose Force.

¹ 1 H. 6. 4. ^k F. N. B. 220. h. 197. c. ^{*} Cro. Eliz. 854.
¹ F. N. B. 220. f. 21 Ed. 4. 10. b. ^m Ante 48. b. ⁿ 9 Co.
 78. a. Cro. Eliz. 622. ^o F. N. B. 220. h. ^p Vid. Dyer 89.
 pl. 111. Bona & Catalla omitted. ^q F. N. B. 197. t. Ante
 48. b. 21. Ed. 4. 10. b. ^r F. N. B. 197. u.

But if the Lessor oust the Lessee, and presently make a Feoffment, so that the Feoffee be Party or privy to the Ouster of the Lessee, then the Lessee shall have *Ejectione Firme vi & armis* against the Feoffee, for that he is Party to the Ouster and to the Wrong done him. And this Writ of *Quare ejecit infra Terminum* was devised by William de Moreton by Equity of the Statute of Westminster 2. cap. 24¹.

The Form is, *If A. shall make, &c. then summon, &c. B. that he be, &c. to shew wherefore he desorceth the aforesaid A. of one Messuage, &c. which C. demised to him for a Term of Years which is not yet passed, within which Term the same C. sold that Messuage to the aforesaid B. by reason of which Sale he the said B. hath ejected the aforesaid A. from the Messuage aforesaid, as it is said.*

In Case of Goods,

Are Writs of Debt, Detinue, Account, Rationabili Parte Bonorum.

Statute.

6 Rich. 2. cap. 2. *In Writs of Debt, Account, or the like, if the Plaintiff declare, that the Contract was in another County than is contained in the original Writ, the Writ shall abate.*

Prerogative.

The King may take his Debtor into his Protection, so that no other shall sue or arrest him until the King be satisfied: and this is a Protection *cum clausula volumus*, which he may grant by his Prerogative.^b There is another Writ in the Register, which is called a Protection *cum clausula nolumus*, which willeth, that the Goods, Chattels, or Leases of a Man, shall not be taken for the Business of the King; which may be as well for a Secular as a Spiritual Man, and is by the special Grace and Favour of the King.

PREROGATIVE.

When Goods of the King come into the Hands of a Subject, (whether it be by Matter of Record, or Matter in Deed, so that he is accountable for them) his Land is all the time chargeable with it, and subject to be seized by the King, into whatsoever Hands it comes, whether by Descent, Purchase, or otherwise. Plowd. 321. Dy. 160. pl. 41.

Statutes.

Vid. 13 El. c. 41. 14 El. c. 7. & 27 El. c. 3. *Where Land shall be liable in Debts to the King.*

^a F. N. B. 198. b. 21. Ed. 4. 10, 30. 1 H. 5. 4. Acc. ^t F. N. B. 198. a. ^a F. N. B. 28. b. Co. Litt. 131. b. ^b F. N. B. 29. a. Co. Litt. 131. b.

Statutes.

[b]

Statutes.

25 Ed. 3. cap. 19. *The Creditor shall have an Action against the King's Debtor, and shall have Judgment against him, notwithstanding such Protection. But he shall not have Execution, unless he will take upon him to pay the Debt which the Debtor oweth to the King; and then he shall have Judgment and Execution against the King's Debtor for both the Debts.*

^c Writ of Debt, which is for any thing due by Obligation or Bargain for a Thing sold to him, or by Contract, or upon a Loan, or by ^d Judgment.

* If it be of Money due in their own Right, it is in the *Debet* and *Detinet*, otherwise in the *Detinet* only: As in Action of Debt for the Rent of Wheat and Capons reserved upon a Lease for Years, or of any Chattel alive or dead; in Debt ^e by or ^f against an Executor for Rent upon a Lease of Land, altho' it be in Arrear after the Death of the Testator, or upon ^g a former Recovery of Debt or Damages against Executors, or for Arrearages found in an Action of Account brought by them, for all is in the Right of their Testator, and therefore in all the Cases before the Writ shall be in the *Detinet* only. But against the ^h Heir upon the Obligation, &c. of the Ancestor, it lies in the *Debet* and *Detinet*, for the Assets which he hath in his own Right, makes it his proper Debt. So ⁱ for an Abbot or Prior upon an Obligation of the Predecessor, altho' that he himself only be in Arrearages. And ^k in a Writ against Husband and Wife, upon Recovery of Debt and Damages against the Wife when she was sole.

The Form is, *Command A. that he render to B. 10 l. which he owes him, and unjustly detains from him, as he saith; and unless he will do it, and the aforesaid B. shall make you secure, then summon, &c.*

^c F. N. B. 119. g. ^d 5 Ed. 4. 1. * 1 Rol. Abr. 604. Bro. Ley 26. 50 Ed. 3. 16. ^e 19 H. 8. 8. ^f 10 H. 7. 5. ^g 10 H. 7. 5. ^h Ante 28 * b. Plowd. 441. 5 Co. 36. a. 10 H. 7. 8. b. Cro. El. 350, 712. 1 Sid. 342. 1 Lev. 224. ⁱ 47 Ed. 3. 23. b. 1 Ro. Abr. 603. ^k 47 Ed. 3. 23. b. 1 Rol. Abr. ib.

Statutes.

Vide Magna Charta ¹, cap. 8. *The Sureties shall not be distrained, so long as the principal Debtor is sufficient.*

Vide 32 H. 8. cap. 37. in Rents above.

In Actions of Debt ^a upon Simple Contracts, that is to say, meer personal Contracts which arise without the [109] Deed or Privity of others, the Defendant may wage his Law. As in Debt for Money borrowed; Detinue of a Horse, or other personal Thing; in Debt for Rent reserved upon a Lease for Years ^b of a Stock of Sheep, or the like; but not in Debt upon a Lease ^c of Land, altho' it be of Land stored with Beasts, that is to say, the Defendant shall not wage his Law for the Rent due for the Beasts, for all is but one intire Contract, nor in Detinue ^d of a Charter which concerns Land, nor in an ^e Action upon the Case, or upon a ^f Statute. Altho' it ought to be without Deed, ^g for in Debt upon the Sale of a Horse for 10 l. if the Plaintiff have a Specialty thereof, he shall estopp the Defendant to wage his Law. But in ^h Detinue, and Count of Bailment by Deed, yet the Defendant may wage his Law, for the Detinue is the Cause of the Action, which may be discharged by Matter in Deed, as Redelivery of the Defendant, or the

PREROGATIVE.

None shall wage his Law against the King, 50 Ed. 3. 1. Bro. Ley 72. And therefore in Attachment upon a Prohibition, the Party shall not wage his Law that he hath not followed contrary to the King's Prohibition, for the King is in a manner Party to the Contempt, 24 Ed. 3. 39. Bro. Ley, 88. 56. 18 Ed. 3. 4. And where Debt upon a Simple Contract is forfeited to the King by Outlawry, or the like, the Party shall not have his Law, Cro. Car. 187. 4 Co. 95. b. Moor 206. Neither in a Quo minus in the Exchequer brought by the King's Debtor against one that is indebted to him in a Simple Contract, shall the Defendant there have his Law, for the Benefit of the King, altho' in such Action he is not the sole and immediate Party, 32 H. 6. 24. 8 H. 5. Fitz. Ley 66. 20 Ed. 3. 63. b. 10 H. 7. 6. 35 H. 8. Bro. Ley 102. Co. Litt. 295. a. 4 Co. 95. b. 9 Co. 83. a. Godb. 291.

¹ The Writ de Plegiis acquietandis is grounded upon this Statute.

^a Dr. & Stud. lib. 1. cap. 8. 2 Inst. 45. Co. Litt. 295. a. ^b 1 H. 6. 1. Bro. Ley Gager 64. Note. 2 Rol. Abr. 108. E. pl. 5. ^c 9 Ed. 4. 1. Bro. Ib. 58. 4 H. 6. 17. b. 2 Rol. Abr. 108. pl. 4. Dr. & St. lib. 1. c. 8. Co. Litt. 295. a. ^d 44 Ed. 3. 41. 14 H. 6. 1. Bro. Ley 61. 20 H. 6. 38. 2 Rol. Abr. 108. pl. 1. 8 Ed. 4. 3. 34 H. 8. Bro. Ley 97. Co. Litt. 295. a. ^e 18 Ed. 4. 23. b. & Bro. Ley Gag. 22. notwithstanding 48 Ed. 3. 6. 2 Ro. Abr. 108. G. pl. 1. to the contrary. ^f 10 H. 7. 18. Bro. Ib. 106. Co. Litt. 295. ^g 39 H. 6. 35. Dy. 23. pl. 143. Co. Litt. 295. a. ^h 27 H. 8. 22. Bro. Ley Gager 3.

taking it back again by the Plaintiff. Lastly, it ought to be without the Privy of others; ¹ as in Detinue, on Delivery by the Hands of another, the Defendant may wage his Law, because he shall not answer to the Delivery, but to the Detinue. So in Debt ^k, upon a Contract by the Hands of another; but not in ¹ a Writ of Account upon Receipt by the Hands of another, for there he shall answer to the Receipt.

Now where a Man may wage his Law, in ^m such Actions his Executors shall not be charged, that is to say, in ⁿ Debt upon a Sale of Goods to the Testator, the Executor shall not be charged, altho' the Party hath a ^{*} Tally insealed thereof, for this is not any Specialty; nor in Debt, for Wages due by the Testator upon a ^o Retainer. Otherwise it is in such an Action brought by a ^p Labourer, for he is bound by the Statute to serve, and in ^q Debt upon Arrearages of Account made by the Testator before Auditors (who are Judges of Record) or upon a ^r Lease for Years, tho' it be without Deed. Same Law in an ^s Action on the Case on *Assumpsit* to pay a Sum of Money borrowed; for in none of the said Cases could the Testator wage his Law.

Statutes.

Magna Charta, cap. 28. *None shall be admitted to wage his Law, without credible Witnesses.*

[b] 5 H. 4. cap. 8. *In Debt upon Arrearages of Account before Auditors, the Justices shall have power to examine Attornies or others, and thereupon to admit or oust the Law.*

¹ 18 H. 8. 3. Bro. ib. 1. 8 H. 6. 10. Bro. ib. 41. 21 H. 6. 30. Bro. ib. 47. 32 H. 6. 12. 13 H. 7. 3. 33 H. 6. 8. b. 2 Rol. Abr. 109. pl. 8. 110. pl. 6. Co. Litt. 295. a. ^k 18. H. 8. 3. Bro. ib. 1. 2 Rol. Abr. 110. pl. 7. 34 Ed. 3. F. Ley 61. ¹ Ibid. 18 H. 8. 3. Bro. Ley 1. 29 Ed. 3. 26. b. 36. 30 Ed. 3. 19. 22 H. 6. 39. 13 H. 7. 3. 33 H. 6. 8. b. 21 Ed. 4. 55. b. 2 Ro. Abr. 109. H. pl. 10. I. pl. 1. unless it be by the Hands of his Wife, &c. 15 Ed. 4. 6. Bro. Ley 92. Co. Litt. 295. a. ^m 9 Co. 87. b. Plowd. 182. Dy. 23. pl. 144. 1 Rol. Abr. 924. pl. 4. Bro. Dette 188. ⁿ 15 Ed. 4. 25. ^{*} 25 Ed. 3. 40. Vaugh. 100. ^o 4 H. 6. 19. b. 9 Co. 87. b. 88. Mo. 698. ^p 11 H. 6. 48. b. Bro. Dette 188. 2 H. 4. 14. Bro. Dette 53. 1 Ro. Abr. 924. pl. 7. Mo. 698. 9 Co. 88. a. ^q 10 H. 6. Fitz. Executors 21. 1 Ro. Abr. 924 P. pl. 2. agrees. ^r Bro. Executors 33. ^s 9 Co. 87. Pinchon's Case.

Writ

^t Writ of Detinue is upon detaining any thing pledged or delivered to him or otherwise, which is called a Writ *de Cattallis reddendis*; if it be for Charters, it is called a Writ *de Chartis reddendis* ^u.

The Form is, *Command A. that he render to B. Goods to the Value of 10 l. (or one Charter, or the like) which he unjustly detains from him, as he saith.*

The Defendant shall here have Garnishment, that is to say, when it is alledged by the Defendant that it was upon a Bailment by the Plaintiff and another, or for another upon condition ^v; as that if J. S. doth such a thing, the Goods shall be delivered to him, if not, then they shall be delivered back to the Plaintiff (for altho' the Plaintiff alone deliver the Goods, and J. S. be a Stranger to it, yet J. S. is to have advantage of the Condition, and may have Writ of Detinue) then in such Case that other Person shall be made to come in, to shew whether by reason of the said Bailment which the Defendant so alledges, and for the ^b Place, ^c Condition, and ^d Matter of the Bailment, *viz.* who bailed it, &c. (from ^e which the Garnishee may not vary, tho' the same agree or disagree to the Declaration of the Plaintiff) he himself or the Plaintiff ought to have the Goods; for ^f Garnishment is only to ascertain whether the Condition, &c. alledged by the Defendant be performed or not: And if the Goods were delivered upon other Condition than the Defendant alledged, the Garnishee is not damaged, but the Defendant; for the Garnishee may recover them by Writ of Detinue, and the Defendant by his false Plea makes himself chargeable both to the Plaintiff and to the Garnishee. But if the Defendant don't ^g affirm any certain Bailment for the Place, Condition, Matter, &c. as if the Plaintiff declares upon Bailment on certain Conditions, &c. and shews what, and that he hath performed them, and the Defendant prays Garnishment generally, there the Garnishee may vary from the Bailment alledged by the Plaintiff, for the Defendant hath not affirmed it.

^t Old N. B. 162. b.

^u Old N. B. 65. b.

^v 14. Ed.

4. 2. ^b 21. H. 6. 35.

^c 40 Ed. 3. 11.

^d 20 Ed. 4.

13. ^e 40 Ed. 3. 11.

40 Ed. 3. 11.

^g 21 H. 6. 35.

Y 2

Writ

^b Writ of Account is for Account to be rendered of Things received to the Use of another; as if a Man be made Bailiff of a Manor, &c. the Writ shall be against him as Bailiff; if he be made Receiver of his Rents, Debts, &c. then as Receiver; and if he be both Bailiff and Receiver, then it shall be against him as Bailiff and Receiver.

PREROGATIVE.

The King may have a Writ of Account against Executors; so may not any other, Plowd. 321 & 322. 11 Co. 89. b. Bro. Prerog. 126. Littlel. §. 125. Vid. 4 Anne, cap. 16. sect. 27.

[110] unless he will do it, and the aforesaid B. shall make, &c. then summon, &c.

Statutes.

Marlbridge, cap. 23. *A Capias is given in a Writ of Account against Bailiffs, if they have not Land by which they may be distrained.*

Westminster 2. cap. 11. *Where a Man assigns Auditors to his Bailiff or Receiver, and he is found in Arrear, the Auditors shall commit him to the next Gaol, and he shall be there in Irons, until he have agreed it. If he complain (being committed) that the Auditors will not allow him his reasonable Allowances, and will find Sureties to be before the Barons of the Exchequer, he shall have a Writ to bail him; and his Master shall be warned to be there with the Rolls by which he made his Account; and if he be found in Arrear before the Barons or Auditors that they shall assign, he shall be committed to the Fleet. If he will not render an Account, Distress shall be returnable before the Justices, who shall assign Auditors, and upon his being found in Arrear, they shall commit him to Gaol as above. But upon Non est inventus returned, Exigent shall issue until he be outlawed.*

Upon Escape, the Master shall recover his Damages against the Gaoler, by Writ of Debt.

ⁱ Writ de Rationabili parte Bonorum is for the Wife or Children to have their Parts of the Goods of the de-

^b F. N. B. 116. p. 9 Ed. 4. 40. b. 1 Rol. Abr. (F) pl. 4. 5. ⁱ F. N. B. 122. l.

ceased.

ceased. The Form is, *If A. who was the Wife (or Son, or Daughter) of B. shall make, &c. then summons &c. C. and D. Executors of the Testament of the aforesaid B. that they be, &c. to shew wherefore, whereas according^k to the Custom which has hitherto obtained in the County aforesaid, Wives after the Death of their Husbands (or Children after the Death of their Fathers, who are not their Heirs, nor were promoted in the Life of their Fathers) ought to have a reasonable Part of the Goods and Chattels of their said Husbands (or Fathers) they the said Executors unjustly detain her reasonable Part, to the Value of 10 l. of the Goods and Chattels which were of the aforesaid B. sometime her Husband (or the like) and refuse to render the same to her, to the Damage of her the said A. &c.*

The Writs rehearse only the Custom of the Counties, but¹ yet it seems that this was the Common Law of the Land.

In Case of Personal Charges,

Is Action of Covenant, and Action on the Case upon Assumpsit.

Writ of Covenant, where the Covenant is not performed. The Form is, *Command A. that he keep the Covenant between them made, concerning, &c. And if he will not do it, then summon, &c.*

Action on the Case upon Assumpsit lies for an Assumpsit not performed. The Form is, *If A. shall make you secure, &c. then summon, &c. Wherefore whereas* (reciting the whole Consideration, Assumpsit, and the Breach thereof, as the Case is.)

[b]

C H A P. XIII.

Of Writ of Error, Audita Querela, Attaint, and Disceit.

Hitherto have been altogether specified the Actions which serve merely to draw some new Thing in

^k See the Writ, *Quare cum secundum consuetudinem totius regni Angliæ usitatam & approbatam*, adjudged good, 30 Ed. 3. 26. Vide Co. Litt. 176. b. 2 Inst. 33. con. ra.

Suit. Such as are to defeat a Thing that hath passed in Suit before, are Writ of Error and Attaint, or Writ of Disceit and *Audita Querela*. Whereof the Writ of Error and *Audita Querela* are but Commissions in their Nature.

Writ of *Error* is to reverse Error in the Judgment or Execution; for a Writ of Error lies in the giving of Execution (as upon a *Capias ad satisfaciendum* awarded for Damages recovered in a real Action) as well as in the giving of Judgment^m.

Statutes.

9 Rich. 2. cap. 3. *He in Reversion shall have Error or Attaint upon Recovery against Tenant for Life in a Præcipe, and the Tenant for Life shall be restored to the Mesne Issues, except that he be of Covin with the Demandant.*

32 H. 8. cap. 30. made perpetual 2 Ed 6. cap. 32. *After Verdict in any Court of Record by twelve Men or more, Judgment shall not be staied nor reversed for any Mispleading, Want of Colour, insufficient Pleading, Miscontinuance, Discontinuance, misconveying of Process, mis-*
 [111] *joining of Issue, Want of Warrant of Attorney for the Party against whom the Verdict passes, or any other Fault or Negligence of the Parties, their Counsellors, or Attornies.*

18 Eliz. cap. 14. *After Verdict in any Court of Record by twelve Men or more, Judgment shall not be staied nor reversed for Default in Form, or Want of Form (as to false Latin, Variance from the Register, or other Defaults in Form) in any Writ, original or judicial, Declaration, Bill, Complaint, Suit, or Demand, or for want of any Writ original, or judicial, or by reason of any imperfect or insufficient Return of the Sheriff, or other Officer, or for want of any Warrant of Attorney, or by reason of any Fault in Process upon or after Aid Prier, or Voucher.*

23 Eliz. cap. 3. *Every Writ of Covenant, or other Writ, whereupon any Fine shall be levied, the Return thereof, the Dedimus potestatem, the Return thereof, the Concord, Note, and Foot of such Fine, the Proclamations,*

^m 16 H. 7. 6. b.

and

and the Ring's Silver, every Writ of Entry in the Post, or other Writ, whereupon any common Recovery shall be suffered, the Writs of Summons ad warrantizandum, and the Returns of the same, and every Warrant of Attorney may, upon Request or Election of any Man, be inrolled; which Inrollment shall be of as great Force and Validity to all Purposes, as the same being extant ought to be by Law. No Fine, Proclamation, or Common Recovery, shall be reversed by Writ of Error, for false Latin, Rasure, Interlining, Mis-entring of any Warrant of Attorney, or of any Proclamation, misreturning, or not returning of the Sheriff, or other want of Form in Words, and not in Substance.

See many Provisos, and other good Matters in the same Statute.

3 H. 7. cap. 10. ⁿ The Defendant or Tenant that sues a Writ of Error before Execution had, shall render Costs and Damages upon the Judgment being affirmed, upon Discontinuance, or Nonsuit.

Westminster 2. cap. 31. Advantage shall be taken (viz. in a Writ of Error) of an Exception pleaded and disallowed, if any of the Justices seal a Bill of Exception.

• In this Writ, if it be to reverse Error in the Judgment, he shall have a Supersedeas for Execution to stay [b] until the Error be discussed, be it Matter apparent, or Matter in Deed which is alledged for Error. But no Supersedeas shall be had in Attaint; for that which is found by the Oath of twelve Men shall be intended true until it be reversed, at least it is as well intendable true, as false. Also ^a the Writ of Supersedeas may be made and contained in the Writ of Error itself.

Statute.

3 Jac. 1. cap. 8. ^b No Supersedeas shall be had in a Writ of Error to reverse a Judgment in an Action of Debt upon a single Bond, or upon any Obligation with Condition to pay Money only, or for Rent, or upon any Contract, sued at Westminster, except he who sues the same be first bound to the Party for whom Judgment is given, in double the Sum,

ⁿ Confirmed by 19 H. 7. c. 20. ^o 5 H. 7. 22. b. ^a F. N. B. 23. d. ^b Made perpetual 16. and 17 Car. 2. c. 8.

by Recognizance in the same Court, to prosecute with Effect, and to pay him, if the Judgment be affirmed, his Debt, Costs, and Damages adjudged, and which shall be awarded for Delay of Execution.

Writ of Error shall be always brought in the King's Bench, not only where the Error is an ^e inferior Court of Record, as in a City or Town corporate, but also in the ^d Common Pleas. And a Writ of Error shall ^e never be brought in the Common Pleas. But ^f at the Common Law, without the Aid of any Statute, the Judges may amend, as well their Judgment, as any other Part of the Record in the same Term; for during the Term, the Record is in the Breast of the Justices, and not in the Roll.

^g But Error in the King's Bench itself shall be reversed in Parliament by the King and Lords of Parliament: The Order of which is such; the Party who is to sue it, ought to have a Bill indorsed by the King, and thereupon the Chancellor makes to him a Writ of Error, and then the Chief Justice of the King's Bench shall carry with him into Parliament, to the Lords in the Inner Chamber of Parliament, the Writ of Error, and the Bill indorsed, and all the Rolls wherein are contained the Pleas, and the Process where Error is supposed; and there he shall leave the Transcript of the whole Record and Process, &c. and also the said Writ of Error with the Clerk of the Parliament, who shall have the Custody thereof; and by the Lords only, not the Commonalty, a Steward shall be assigned, who with the Lords, by the Advice of the Justices, shall proceed to amend the Errors.

Statutes.

- [112] 27 Eliz. cap. 8. ^h *Error in the King's Bench, in Debt, Detinue, Covenant, Account, Action on the Case, Ejectione Firmæ, or Trespass first commenced there (where the King is not Party) may be reversed, at the Election of the Party, in the Exchequer Chamber, before the Justices of the*

^e 14 H. 7. 1. b. ^d F. N. B. 21. i. ^e Dyer 250. b.
^f 8 Co. 156. b. 157. a. Co. Litt. 260. a. Hale's F. N. B. 21. i.
^g 1 H. 7. 19. b. 4 Inst. 21. 72. Dyer 375. ^h Vide 4 Inst. 72.

Common Bench, and such of the Barons as are of the Coif, or six of them at least: Other than for Errors concerning the Jurisdiction of the Court of King's Bench, or for want of Form in any Writ, Return, Plaint, Bill, Declaration, or other Pleading, Process, Verdict, or Proceeding whatever. And the Judgment being affirmed or reversed, the Record shall be remanded back into the King's Bench to award Execution thereon. The Party grieved with such Reversal or Affirmance shall have a Writ of Error in Parliament, as upon a Judgment in the King's Bench.

31 Eliz. cap. 1. Any three of the Justices and Barons, if the full Number don't come, may receive Writs of Error, award Process, and prefix Days for the Continuance in the Writ of Error.

By the Writ of Error the Record shall be removed, for every ^a Writ of Error is a *Certiorari* in itself; and ^b then the Plaintiff shall assign Error, which ^c Assignment is as a Declaration, and upon ^d that he shall have a *Scire facias*, ^e until which, viz. that the Parties have Day by the *Scire facias*, the Record shall not be entered.

^f The Writ shall be directed to the Justices, before whom the Plea was holden.

If ^g they will not certify the Record, he shall have *Alias*, *Pluries*, and upon that, *Attachment* for Contempt.

If they ^h do not certify all the Record, then he may allege Diminution, and pray a Writ to the same Justices who certified the Record before, to certify all the Record.

The Form of assigning Errors is, *And the aforesaid A. as before saith, that in the Record and Process aforesaid, and also in the giving of Judgment of the Plaint aforesaid, there is manifest Error in this (and so assigns the Errors) and prays that the Judgment aforesaid, for those and other Errors which are in the Record and Process aforesaid, may be revoked, annulled, and wholly holden for none, and that he may be restored to all Things which he hath lost by reason of that Judgment, &c. and that the Court here may proceed to the Examination of the Premises, &c. And the aforesaid B. as before saith, that in*

^a 12 Ed. 4. 11. b.

^b F. N. B. 20. e.

^c 6 Ed. 4. 5. b.

^d F. N. b. 20. e. 12 Ed. 4. 11. b.

^e F. N. B. 22. f.

^f See

the Writ,

^g F. N. b. 23. g. 24. e.

^h F. N. B. 25. a.

the

[b] *the Record and Process aforesaid, and also in the giving of the Judgment aforesaid, there is no Error, and prays also that the Court here may proceed to the Examination of the Premises, &c. and that the Judgment aforesaid may in all Things be affirmed.*

¹ Writ of *Attaint* lies, where the Jury give a false Verdict, for him against whom it is given, to inquire thereof to the intent that the Judgment given thereupon may be reversed, and the Party restored to all that he hath lost, that is to say, if he be Defendant, to his Damages and other Thing whatsoever, if he be Plaintiff, to his Title, Action, &c. for Attaint does not lie until Judgment given; and if ^a the Writ of Attaint bear date before Judgment, the Writ shall abate. And it lies ^b only upon a Verdict by twelve; for upon a Loss in a Writ of Right no Attaint lies, neither at the Common Law, nor by any Statute, because the Verdict is given by more Jurors than twelve, viz. the Grand Assize. Neither does Attaint lie in ^c an Inquest of Office, as upon a Writ to inquire of Damages in a Writ of Trespas, for there the Jury may be a lesser Number than twelve.

The Form is, *If A. shall make, &c. then summon 24 lawful Knights of the Visne of N. that they be before us (or before our Justices, as the Case is) on the Octave, &c. ready by Oath to recognize whether the Jurors by whom a certain Inquisition was lately taken before us (or the like) at W. by our Writ, &c. which was between B. and the aforesaid A. have made a false Oath, as the same A. grievously complaining to us hath shewed: And in the mean time, that you diligently inquire who were the Jurors by whom that Inquisition was taken, and have them then before us (or the like). And summon, &c. the aforesaid B. that he be then there to hear that Recognizance: And have, &c.*

¹ 18 Ed. 4. 9. ^a 9 Aff. pl. 21. ^b Bro. Attaint. 42. Ante 88. a. 8 H. 4. 23. b. Bro. ib. 26. ¹ Ro. Abr. 280. pl. 6. ^c 39 H. 6. 1. 2 H. 4. 2. b. Fitz. Attaint. 13. Bro. Enquest. 9. 19 H. 6. 8. 10 b. Fitz. Damages 24. Bro. Abridgm. 7. 21 Ed. 3. 57. 40 Aff. 23. Bro. Attaint. 79. 3 H. 6. 29. b. Ibid. 105. Fitz. Attaint 63. 1 Rol. Abr. 280. pl. 5. Co. Litt. 355. b. 2 Inst. 129. 10 Co. 119. a. 11 Co. 6. a. 1 Rol. Rep. 30. Vaugh. 153.

This is to be brought in the Life of him for whom the Verdict was given, and of some of them who gave the Verdict, which we call the *Petit-Jury*; for if either the ^d Party himself, or all ^e the *Petit-Jury*, or all of them ^f but one be dead, no Attaint lies.

And it lies only upon a Verdict in personal Actions, other than Trespasses; for it seems that ^g Attaint was at the Common Law, because *Westminster* 1. cap. 38. speaks of Attaints without expressing any Penalty, and 34 *Ed.* 3. cap. 7. gives it in Plea real, as well as personal; so that it lay before in Plea personal, Debt, Detinue, Covenant, and the like, but not in Trespass, for it is given by Statute; and the Reason why it did not lie at the Common Law in Action of Trespass is, because then upon the Judgment reversed, the King should lose his Fine; and in Plea ^h real of Land this did not lie at the Common Law, for *Westminster* 1. cap. 38. gives it in such Case: And the Reason was, because he that lost might have a Writ of Right.

The Jury herein (called the *Grand-Jury*) are 24, who are to be warned the first Day ⁱ.

The Process against the Party is Summons and Return, as in Assize of Mortdancestor, Assize of Darrein Presentment, and *Juris utrum*; against the Petit-Jury, *Venire facias*, and *Distringas* ^k. [113]

The Petit-Jury ought always to be present when the Grand-Jury is taken, otherwise it shall never be taken; which was a great Mischief at the Common Law, for it might be that some of them had nothing, and therefore would never appear ^l.

And the Petit-Jury may plead ^a in Bar of the Attaint, as by Release, Arbitrement, &c. (for this excuses their false Oath) but not in ^b Abatement of the Writ, as another Attaint pending, or, that the Demandant hath nothing but jointly with J. S. not named in

^d Dyer 5. pl. 1. 26 Aff. pl. 12. ^e 13 Ed. 4. b. ^f 34 Aff. pl. 6. 26 Aff. pl. 2. ^g Bro. Attaint. 42. 2 Inst. 130. ^h 2 Inst. 130. 237. contra. ⁱ Old N. B. 111. ^k Old N. B. 112. ^l 22 H. 6. 8. b. ^a 35 H. 6. 30. ^b 19 Aff. pl. 15. Note here, 'tis a Rule, that the Petit-Jury can plead no Plea, but such as may excuse them of their false Oath, as *Finch* does here intimate. 12 H. 6. 6. Fitz. Attaint. 61. 65. Kelwey 130. a. and 1 Rol. Abr. 285. O. pl. 1. same Rule.

the Writ; or if a Feme bring an Attaint, to say, that she is covert.

The Plaintiff in Attaint shall not give more in Evidence, than he gave to the first Jury; but the Defendant in Affirmance of the first Verdict may^d.

Statutes.

Westminster 1. cap. 38. *Attaint is given in Plea of Land, or of Freehold, or of a Thing which touches the Freehold.*

1 Ed. 3. cap. 6. *It shall be as well upon the Principal as upon Damages in a Writ of Trespass, altho' the Damages are not paid.*

28 Ed. 3. cap. 8. *It shall be granted as well upon a Bill of Trespass, as a Writ of Trespass, without having regard to the Quantity of the Damages.*

34 Ed. 3. cap. 7. *It shall lie as well in Plea real, as personal.*

9 Rich. 2. cap. 3. *Error and Attaint shall be for him in Reversion, presently upon Recovery against Tenant for Life; and Tenant for Life shall be restored to the Mesne Issues, if he was not of Covin with the Demandant.*

5 Ed. 3. cap. 6. *ousts Essoign of the King's Service and Protection. Five Days in the Year shall be given in them. Nisi Prius shall be in them.*

14 Ed. 2. cap. 2. *de Vicecomiti et Viridi Cera. Upon Default of the Petit-Jury, or Nihil returned at the Grand Distress, the Jury shall be taken.*

[b] Vide 23 H. 8. cap. 3. made perpetual 13 Eliz. cap. 25. *The Forfeiture of the Petit-Jury, where the Matter amounteth to 40 l. and doth not concern Life, and also where it is under 40 l. and the whole Manner of Proceeding.*

Every Attaint shall be sued in the King's Bench, or Common Pleas.

Nisi Prius may be upon the Distress by the Discretion of the Justices.

The Petit-Juror may be by Attorney.

^c Dy. 53. pl. 14. 129. pl. 65. 1 Rol. Abr. 285. P. pl. 1. Hob. 227. Godb. 271. ^d Dy. 53. pl. 14. agreed *per Cur.* But then the Plaintiff in the Attaint may have an Answer thereto, and disprove it as well as he can, but he can't give other Evidence, nor enforce the first Evidence with more Matter than was given and disclosed before.

Dy. 212. pl. 34.

11 H. 6. cap. 4. *The Plaintiff shall recover his Damages and Costs against the Juror or Defendant who pleads feint Pleas in Delay.*

Now follow the Writ of *Disceit* and *Audita Querela*. Writ of *Disceit* (being of another Nature than the Writ of *Disceit* before) is to Defeat any thing which by reason of some Falsity he hath lost in Judgment; ^a as if in a Plea of Land, or in a *Scire facias* upon a Recognizance of Debt, the Sheriff return the Tenant or Defendant summoned, where he was not, by which he lost by Default; or if a Man ^b levy a Fine at the Common Law, or suffer a Recovery in the Common Pleas of Land in ancient Demesne, the Lord shall have a Writ of *Disceit*.

And the Plaintiff shall here be restored to all that he lost, that is to say, ^c if the Recovery was in a *Quare impedit*, to the Damages, as well as to the Church, ^d if in a *Formedon*, then to the Land, but not to Damages, for he did not lose any Damages in the *Formedon* before; and ^e the Fine of the Land in ancient Demesne shall be defeated.

And this Writ is of the Nature of the first Action, that is to say, if it be upon a Loss, or the like, it is a ^f real Action, and Summons and Severance lies in it; for the Inheritance shall be recovered. Also if a Man ^g lose Land by Default in a *Præcipe quod reddat*, and die, his Heir shall have an Action of *Disceit* as well as the Father, and shall have Restitution; so shall a Man ^h have against the Heir of him who recovers.

ⁱ It may issue out of the Common Pleas, if the Party will, as well as out of the Chancery, but then he shall not recover the Land in case the *Disceit* is found, but only Damages; for the Freehold may not be recovered by Writ which issues out of the Common Pleas, but it behooveth to sue a Writ original.

If it be upon Summons falsely returned in Plea of Land, *viz.* where he was not summoned, by which he lost the Land at the Grand Cape returned, the Trial ^k

^a F. N. B. 97. c. d. Ante 26. b. ^b F. N. B. 98. a. ^c 33 H. 6. 10. ^d 27 H. 6. 5. ^e 7 H. 4. 44. ^f 27 H. 6. 5. ^g F. N. B. 98. g. ^h F. N. B. 97. c. ⁱ 17 Ed 3. 76. b. ^k 27 H. 6. 5. 8 H. 6. 2. F. N. B. 97. c.

shall be by Examination of the Summoners and Viewers; and therefore it shall be ¹ brought during the Life of some of them. And it ^m lies against him who recovered before he hath Execution, in respect of the Mischief that might arise, if the Summoners and Viewers should die.

[114]

Statutes.

2 Ed. 3. cap. 7. *Writ of Disceit is given, as well in Garnishment of Plea of Land, as in Summons of Plea of Land.*

The ^a Process is *Venire Facias*, and upon that Judgment shall be annulled if he do not come.

Writ of *Audita Querela* lies for him who is or ought to be in Execution, to relieve him upon good Matter of Discharge, which he hath not any Means to plead.

^b As if one who hath a Release be taken in Execution in a Court (as in the Common Pleas) by Writ out of another Court (as out of the Chancery) returnable into the Common Pleas upon a Recognizance or Condemnation in the Chancery (but if the Recognizance or Condemnation had been in the Common Pleas, then they may avoid Process upon the Matter.) ^c If Execution be sued of a Recognizance by *Fieri Facias*, or *Elegit*; (but not by *Scire Facias*, for then he hath Day to answer, and therefore it is his Folly if he do not come in and plead the Matter that he hath in Discharge, that is, where the Sheriff returns ^d him warned, otherwise if he returns that he hath nothing;) if a Release or Acquittance be made to him after the *Scire Facias* sued; if after Verdict and before Judgment they put themselves upon Arbitrement; and the like.

The Form is, *The King to his Justices of the Bench greeting. From the grievous Complaint of J. we have received Information, that whereas (the Plaintiff was bound in a Statute Merchant to the Defendant who re-*

¹ 22 H. 6. 47. F. N. B. 97. c. ^m F. N. B. 97. c. ^a 8 H. 6. 2.

^b 22 H. 6. 56. ^c 48 Ed. 3. 20. Bro. Aud. Querela 12. 1 Ro. Abr. 306. pl. 3. Co. Litt. 290. b. 5. P. ^d F. N. B. 104. i. Kelwey 23. b. 24. Hob. 283. Cro. Eliz. 4. Cro. Jac. 507. 21 Ed. 3. 13. b. Fitz. Aud. Quer. 25. Bro. 18. 48 Ed. 3. 20. 27 Ed. 3. 82. b. 1 Rol. Abr. 306. C. pl. 2. & 5. Moor 433. Style 323. 4.

leased to him, or made a Defeasance to him by Indenture, and yet sued Execution contrary to the Release or Defeasance) and because he would not have the same *J.* injured in this Behalf, we command you, that having viewed the other Part of the Indenture aforesaid, and having called before you the Parties aforesaid, and having heard their Reasons thereupon, you cause further to be done in this Behalf, as of Right, and according to the Custom of our Realm of England ought to be done.

The ^e Process where the *Audita Querela* is sued before Execution, is *Venire Facias* and *Distringas*, and ^f upon Default after Appearance, and Plea pleaded, a *Distringas* to hear Judgment, for by such Default Judgment shall go against him. And here, *viz.* when the *Audita Querela* is sued before Execution ^g, he may have a *Supersedeas* upon good Matter of Discharge shewn in the *Audita Querela*, to stay Execution for once upon finding Sureties. But so he may not ^h if he be in Execution, and he ⁱ shall only have one *Supersedeas* before Execution, ^k altho' it be upon new Matter; but if the *Audita Querela* be ^l abated for Variance from the Record, or the like, there in another *Audita Querela* he shall have a second *Supersedeas*.

The Process after Execution is *Scire Facias*^m, as if he be taken by a *Capias ad Satisfaciendum*, for there he is in Prison; otherwise it is, if he be not taken by a *Capias*, but comes in *gratis*. And this *Scire Facias* is only for the more speedy Delivery of the Party who is in Prison, for if the Process should be by Distress infinite, perhaps the other will lose Issues, in order to keep his Body in perpetual Prison.

[b]

^e 12 H. 4. 6, 15. Bro. *Audita Querela*, 15. 22 H. 6. 56.
F. N. B. 104. u. ^f 12 H. 4. *ibid.* 47 Ed. 3. 1. ^g 17
Ed. 3. 3. b. Dyer, 194. pl. 31. 297. pl. 25. ^h 11
Rich. 2. F. *Supersedeas*, 14. ⁱ 2 H. 7. 12. 21 H. 6. 34. b.
^k 43 Ed. 3. 28. F. N. B. 104. Q. contra. ^l F. N. B. 104. r.
^m 22 H. 6. 56. 15 Ed. 4. 5.

CHAP. XIV.

Of County Courts, and Appeals there.

THUS far have we spoken of the Courts at Westminster, being such as serve to administer Justice throughout the Realm of England. Now follow those which are in every County, which fashion themselves in all Things after the Example of the King's Courts at Westminster, as the Parents from whom they came, but that they do not hold Plea by Writ Original, nor have they Power to award the King's Writs, but their Process is by Precept, and they have not any such Terms as there are at Westminster; and other Differences there are, which shall be noted in their Placesⁿ.

In regard of this special and distinct Government, every County is as one entire Body: So that upon a Feoffment of Lands in many Towns in one County, Livery of Seizin made in one Parcel in any of the Towns, in the Name of all, suffices for all the Land in all the other Towns within the same County; but upon a Feoffment of Land in divers Counties, it behoveth to have Livery of Seizin made in each County. Also^b an Exchange of Land in the same County, is good by Parol, but in divers Counties it shall be by Deed indented. A Man shall take Notice at his Peril of many Things done in the same County, where he is, but not in another County; as notwithstanding an Action of Debt against an Executor^c, he may pay the Affets that he hath, to any other Person, to whom the Testator was indebted, before Notice given him of such Action, where it is commenced in another County, but not if it be brought in the same County, for there the Executor shall take

[115] Notice of the Action at his Peril. An Inquest shall

ⁿ 2 H. 7. 1. 34 H. 6. 49. ^a Litt. §. 61. 418. Perk. §. 226. 7. ^b Litt. §. 62, 63. Perk. §. 244. This is meant of a Freehold or Inheritance; for if the Estate in Exchange be but for Years, then the Exchange is good without Deed, tho' the Lands exchanged lie in different Counties. But if the Exchange be of any Thing that lies in Grant, it must be by Deed, of what Estate soever the Exchange be taken, and tho' every Thing exchanged be in the same County.

^c 2 H. 4. 21. b. 1 Rol. Abr. 927 (T) pl. 2. Fitz. Executors, 51. Plowd. 279. Cro. El. 793. pl. 37. 2 Leon. 60.

not take Notice of Things done in another County ; but yet, inasmuch as all are under one general Government, Things done in several Counties, shall be tried by a Joinder of the Counties: Also the Jury, which tries the principal Thing, may take Notice of a Thing that is Accessary, although it be in another County^d; as in an Action of Trespafs, if the Defendant pleads an Arbitrement in a foreign County, and Issue be taken thereupon, and found for the Plaintiff, the Jury shall there assess Damages for the Trespafs done in the County where the Action is brought; so in Debt against ^e an Executor, who pleads *that he never was Executor, nor ever administred as Executor*, and shews in Evidence a Gift made to him by the Testator in his Life-time in another County, the Jury shall find this on Pain of Attaint; so of a Release pleaded to be made in another County, in a Writ of Right.

These Courts, are the County-Court, and Court-Baron.

Statutes.

Merton, cap. 10. *Every Freeman may make Attorney to do his Suit at the County, Tithing, Hundred, Wapentake, or Lord's Court.*

The County-Court is the Court of the Sheriff for all the Inhabitants within the County; and the Suit there is Suit Real, for which a Man shall be amerced, and not distrained^f.

For this Reason, the Sheriff hath the * Custody of the County; and hath Power to raise ^z the *Posse Comitatus*, that is, as many Men as he pleases, to go with him to take Felons, or to execute the King's Writs, or the like, and ^h the Custody of all Gaols in the County belong to him.

Prerogative.

The King makes the Sheriff by his Letters Patent.

^d 21 H. 6. 51. 11 H. 4. 57. b. 13 H. 4. 7. b. 2 Rol. Abr. 687. L. pl. 2. ^e 9 Ed. 4. 40. ^f 4 Co. 33. 6 Co. 11. b. * 4 Co. 33. a. 9 Co. 49. b. Co. Litt. 168. a. Dalt. Sheriff, 5, 6. 2 Inst. 172. Bac. Elem. 114. ^z 3 H. 7. 1. 2 Inst. 193, 454. * 4 Co. 34. a. 2 Rol. Abr. 75. T. Raym. 423, 468.

Statutes.

8 Eliz. cap. 16. & 13 Eliz. cap. 22. *Where one Sheriff served heretofore for many Counties (there named) now only one shall serve for each.*

Vide 9 Ed. 2. ¹ Stat. De Vieccom. *Sheriffs shall be assigned by the Chancellor, Treasurer, the Barons of the Exchequer, and the Judges.*

Vide 14 Ed. 3. cap. 7. *A new Sheriff shall be so chosen every Year on the Morrow of All Souls^k.*

Vide 1 Rich. 2. cap. 11. ¹ *He that hath been Sheriff for one Year, shall not be chosen again for three Years afterwards.*

The County Court is holden every Month^m.

Statutes.

Vide Magna Charta, cap. 35. & 2 Ed. 6. cap. 25. *No County Court shall be holden but from Month to Month.*

[b] Vide 11 H. 7. cap. 15. *No Sheriff shall enter any Complaint there, except the Plaintiff be present in Person, or by Attorney, or Deputy known to be of good Name, and find Pledges, (Persons known) to pursue his Complaint, and shall have but one Complaint for one Trespass, or Contract.*

Appealsⁿ of Felony, Maihem, Rape, may be sued in this Court by Bill before the Sheriff, and some of the^o Coroners. Which Coroners are chosen^p there in full County Court, by the Freeholders^q of the County: And for their Election, is a Writ *de Coronatore eligendo*, when any Coroner dies, or is discharged of his Office, to elect another in his Stead, and so to elect two or three, as there needeth: For in every County there are four Coroners, more or less, as the use is. Also there is another Writ *de Coronatore exonerando*^r, to discharge him from his Office upon good Cause,

^r ¹ Confirmed 4 Ed. 3. cap. 9. ^k Confirmed 23 H. 6. cap. 8.
¹ Confirmed 23 H. 6. cap. 8. ^m 2 Inst. 71. ⁿ St. Pl.
 Cor. 64. ^o St. Pl. Cor. 55. a. ^p Vide Westm. 1.
 cap. 10. by which it appears, that so they were at the Common
 Law; for there is no Statute before that which gave the Elec-
 tion to the Commons. 2 Inst. 175, 559. 4 Inst. 271. ^q F.
 N. B. 163. k. ^r Ibid.

as if he cannot attend to his Office for other Business of the King in the same County, or if he is infirm, or aged, or unfit, &c. which Writ shall be directed to the Coroner himself. And if he be discharged for any such Cause, and a Writ issue to elect another, the Cause of his Discharge shall be rehearsed in the Writ^a.

Upon Appeal sued there, ^a Sureties of prosecuting shall be first found to the Sheriff.

The Proceedings in such Appeals is, as in Appeals in the King's Bench, viz. *Capias*, *Exigent*, &c.

Statute.

Westminster 1. cap. 10. ^a *Sheriffs shall have Counter Rolls with the Coroners, as well of Appeals as of Inquests, of Attachment, or of other Things which belong to their Office.*

Also Process of Outlawry, is to be directed to the Sheriff in this Court; which is an Exigent, and if he do not appear, then Judgment goes against him, to be out of the Protection of the King and his Laws, which we call Outlawry.

^w Exigent, is a solemn Demand at five several County Courts, the one immediately after the other, and therefore no *Allocato Comitatu* ^x lies, if another County was holden between the Return of the Writ, and Prayer of this Process.

If the Exigent be returned not fully served, without any Default in the Plaintiff, (as ^y where the Defendant after Demand at two County Courts renders himself in Court, and upon Mainprize found hath a *Supersedeas*, and yet doth not appear at the Day; but otherwise ^z it is upon a *Supersedeas* by another Person^[116] that hath the same Name, or where ^a there are only four County Courts between the Delivery of the Writ to the Sheriff, and the Day of the Return of the Writ, for it is the Folly of the Plaintiff himself in the first

^a Ibid. Note, this Cause is not traversable. 5 Co. 58. b.

^t St. Pl. Cor. 64.

^u Fleta, lib. 1. cap. 18. pl. 1.

^w St.

Pl. Cor. 15. Vid. Fleta, lib. 1. cap. 27.

^x 32 Ed. 3. Fitz.

Exigent, 14. Vide infra. ^y 22 Ed. 3. 11. ^z H. H. P. C. 201.

^a 38 Ed. 3. 1.

^a 14 Ed. 3. Fitz. Exigent, 17.

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Case, that he did not put a Difference between their Names, and in the second, that he took such short Time, although ^b it be in the Hustings of London, which are holden incertainly) upon such Return, I say, without any Default in the Plaintiff, if ^c he brings a new Writ of Exigent, (which he call an Exigent *de Novo*) before any other County holden (but not otherwise) he shall have the Benefit of the first Counties; and therefore it is called an Exigent *Allocato Comitatu*, or *Allocato Hustingo*, if it be in London, where their Hustings are as the County Courts.

The Form is, *We command you, that allowing four Counties (or three as the Case is) at which B. was called, and did not appear, (as you yourself returned to our Justices at Westminster, such a Day last past) you cause the said B. to be further called at your County then next to be holden, and so from County to County, until, &c. whereof you yourself heretofore returned to our Justices at Westminster, that the aforesaid B. cannot be found, nor bath any Thing, &c.*

Outlawry, is a Judgment to be out of the Protection of the King, and his Laws.

This Judgment shall be given by the Coroners in the fifth County; and when this, viz. the Outlawry ^d with the Exigent is returned into the Common Pleas, or the like, out of which Court, the Exigent was awarded, then the Outlawry is good, and may be pleaded in Disability of his Person, or the like, but not before, although the Record of the Coroner is shewn to the Court; yet this certified by the Sheriff upon a *Testatum*, is sufficient ^e for the King, but not for the Party. And this * Return ought to be by the Sheriff, for a Return by the Coroners, is not a sufficient Record to make the Party to be outlawed, but if he be molested by Reason thereof, and his Goods taken, he shall have a Writ of Restitution; for [†] although

^b 17 Ed. 3. 43. ^{b.} 2 H. H. P. C. 202. ^c 22 Ed. 3. 11.
² H. H. P. C. 201. ^d 28 Aff. pl. 49. Dyer, 223.
 pl. 24. 38 Ed. 3. 13. Co. Litt. 128. ^{b.} 288. ^{b.} Doc.
 Pla. 307, 396. ² H. H. P. C. 206. ^e Dyer, 317. pl. 6.
 * Bac. Elem. 138. ² H. H. P. C. 206. [†] 4 Inst. 266.

the Coroner gives the Judgment, yet the Sheriff hath the Record and his Exigent, which is his Warrant to proclaim it, and the Coroner hath only a Remembrance. And the † Certiorari to the Coroner to certify the Outlawry, serves for the King to hasten the Sheriff, who is wont to be lack in returning of Outlawries, and to cause him to be amerced for his Falsity and Concealment.

Outlawry ^f disables a Man to sue any Action.

Now, as to all these Matters before the County Court is a Court of Record ^e, for a *Certiorari* lies to the Coroners, to certify the Record of the Outlawry, and *Capias* and *Exigent* lies in Appeal by Bill sued before the Coroners and the Sheriff; and it seems that a Writ of Error lies, and not False Judgment, upon Error in the Appeal. [b]

CHAP. XV.

Of Suits in the County Court by Plaint.

BEFORE ^h the Sheriff alone, without the Coroners, Pleas are holden, by way of Plaint, of Personal Actions, which are to recover any Sum under 40 s. as Trespas, Debt, Detinue, Covenant, Assumpsit, or the like; but not Replevin ⁱ, or Account, although the Sum be so small; for they are not to recover any Sum, but the one is to have the Goods to be delivered, the other is to render an Account. And Trespas, or the like ^k, does not lie here of Damages above 40 s. but a *Supersedeas* lies to the Sheriff upon divers Plaints in the County Court, each under 40 s. when all are one entire Debt of £10. or upon an ^l Action of Covenant brought there to Damages above 40 s. but ^m no Force shall be there supposed; for then a *Supersedeas* lies, in which the Writ shall

† Dyer, 223. pl. 24. 2 H. H. P. C. 206. ^f Littlet. §. 197.
^g St. Pl. Cor. 64. ^h Bac. Elem. 114.
ⁱ Dyer, 246. a. ^k 2 Inst. 311. 4 Inst. 266.
^l 2 Inst. 312. ^m 2 Inst. 311. 4 Inst. 266. F. N. B. 239. d.

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say, that Plea of Trespass *Quare Vi et Armis*, shall not be holden in an inferior Court, but only before the King, or other Justices by his Command.

The Court, being the Court of the Sheriff, is but as a Court Baron, to which all the Inhabitants within the County owe Suit, by reason of their Resiance. And therefore there the Suit, is called Suit Real, to which a Man shall be amerced, not distrained, as he shall be for Suit Service †.

Statute.

Marlbridge, cap. 21. *The Sheriff may make Replevin by Plaint* ⁿ.

The Officer is a Bailiff.

The Process is Summons, Attachment, and Distress ^o, which is good, although it be by Parol, inasmuch as the Trial there is always *per Pais*, and not by Record, for all is but Matter in Fact.

[117] The Suitors are the Judges, not the Sheriff, for he is but a Minister ^p.

The Trial is by Wager of Law, yet by Prescription it may be by Jury, which is against the common Course and Order of it ^q.

The Execution is by Distress only, and impounding until Satisfaction be made; for they have no Power to sell or to deliver the Distress to the Party; and no Execution by Body lies there ^r.

If any Thing ^s which concerns the Freehold comes in Question, in a Plaint of Trespass, or the like, the Court shall not proceed; as where the Defendant avows for Damage Feasant, and the Plaintiff justifies for Common of Pasture: But Suit by Writ ^{*} in the County Court shall proceed. And therefore, in such Case, upon Plaint in the County Court, the Party hath no Remedy but a Writ of Trespass Vicontiel: And by this the Sheriff may determine the Issue, although the Freehold come in Debate.

† Post. 123. a. Old Tenures ad. V. Suit-Service and Suit-Real.

ⁿ Without Writ; cont. it was at the Common Law, Dy. 246. ^o 34

H. 6. 49. ^p 4 Inst. 266. 6 Co. 11. b. 8 Co. 60. b. 1 Mod.

171. Post. 123. b. ^q 2 Inst. 143. ^r 4 H. 6. 17. 22 Aff.

pl. 72. ^s Bro. Juris. 98. 14 H. 8. 51. b. Post. 120. b.

Upon

Upon False Judgment given^u in this Court, he that is grieved may have a Writ to remove it, which requireth the Sheriff to record it, and to have it in the Bench: And the Writ shall say, "*Whereof the afore-said A. (the Plaintiff) complains that false Judgment hath been done to him in the same County.*" Whence this is called a Writ of False Judgment.

Statutes.

Vide Marlbridge, cap. 20. *None shall hold Plea of False Judgment, but the King.*

1 Ed. 3. cap. 4. *A Man shall herein have Averment, that the Record is otherwise than is certified, and it shall be tried by the Country.*

CHAP. XVI.

[b]

Of Justicies, or Vicontiel Writs.

PLEAS in the County Court are sometimes holden by the King's Writ out of the Chancery, which is called *Justicies*, or by Writ *Vicontiel*, because it gives Power to the Sheriff to hold Plea in his County Court, which in effect is but a Commission^a, and is not returnable, but shall be determined there. And in them the same Course and Proceeding shall be holden as in Writs Original of another Nature in the King's Courts at Westminster; that is to say, ^b if it be Debt, Account, or the like, the Process shall be Summons, Attachment, and Distress; if Trespass, Attachment and Distress; but not ^c *Capias* in any Case, neither in Process, nor in Execution, for this lies only in a Court of Record. Also many Actions of one Nature may be joined in one Justicies with several Precepts; and the Sheriff shall hear and determine them by Enquest, according to the order of the Common Law^d.

But this Justicies, doth not alter the Nature of the Court; for the Suitors^e are the Judges, the Pleas are

^a F. N. B. 18. a. 4 Inst. 266. ^a F. N. B. 86. a. ^b 2 H. 4. 25. 34 H. 6. 49. Accords in Plaints in Courts Baron. ^c 3 H. 6. 54. b. Post. 120. b. ^d F. N. B. 86. a. ^e 6 Ed. 4. 3. 35 H. 6. 5. 2 Inst. 312. 4 Inst. 266. 6 Co. 11. b. Co. Litt 117. b. 118, 288. b. Z 4 no

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not of Record, altho' it be by Writ, Writ of False Judgment lies, &c.

And these Writs commence with *A. bath complained to us, that, &c.*

Such Justicies are, sometimes to have the Plea to be holden before the Sheriff alone, sometimes before the Sheriff with the Coroners.

Before the Sheriff alone, are these following,

1. ^f *Affize of Petit Nufance*, when a Mill, or the like (all comprehended in the Verse which follows) is raised to the Nufance of any one.

^{rica} ^{ca} ^{gulta} ^{ges} ^{endinum}
Fab, *fur*, *porta*, *domus*, *Vir*, *gur*, *mol*,
murus, *ovile*,

[118] *Et pons; tradantur hæc Vicecomitibus.*

The Form is, as in Affizes of Nufance above. *A. bath complained unto us, that B. bath unjustly obstructed a certain Gulf in N. to the Nufance, &c. in the same Town, &c. and therefore we command you, that you bear that Plaint, and afterwards cause Justice to be done thereupon, that we may bear no more Clamour thereupon for want of Justice.*

Statute.

6 Rich. 2. cap. 3. *The Party, if he will, shall have an Affize Vicontiel before the Justices of the one Bench or the other, or before the Justices of Affize.*

2. *Admeasurement of Dower*, by the Heir, when his Guardian, or himself in his Nonage, hath endowed the Wife of his Ancestor of more than she ought to have; but by this Writ, she shall not have Land *de Novo* assigned her in Dower, but so much Land only shall be taken of her, as exceeds the third Part, which she is to have in Dower.

The Form is, *A. the Son and Heir of B. bath complained unto us, that C. who was the Wife of the aforesaid B. bath for her Dower more of the Freehold which was the aforesaid B's, sometime her Husband in N. than she ought to have, and than belongs to her to have: And therefore we command you, that justly and without*

‡ F. N. B. 184. b. 4 Inst. 266.

* F. N. B. 148. f.

delay,

delay, you cause that Dower to be admeasured, so that the aforesaid C. may not have more for Dower of the Inheritance of the aforesaid A. than she ought to have, and than belongs to her to have, according to her reasonable Dower; and let the aforesaid A. have of that Dower that which he ought to have, and belongs to him to have, that we may hear no more Clamour, &c. Witnesses, &c.

3. *Admeasurement of Pasture* for one Commoner, when another Commoner hath put in more Beasts into the Common than he ought, be the Common Appendant, or Appurtenant, so that it be to a certain Number^h.

The Form is, *A. hath complained unto us, that B. and C. his Wife have unjustly surcharged his Common of Pasture in N. so that they have in it more Beasts and Cattle than they ought to have, and belongs to them to have, according to their Freehold, which they have in the same Town; and that the aforesaid A. may have in that Pasture, so many Beasts and Cattle as he ought to have, and belongs to him to have, that we may hear no more Clamour, &c.*

And here all the Commoners shall be admeasured, as well those who have not surcharged, as those who have, and also the Plaintiff himself. But this Writ lieth not, neither for the Lord against his Tenants who surcharge, (for he may distrain the Surplusage for Damage Feasant, and, as some say, may have an Affize, for it is a Disturbance of the Profit of his Soil) nor for the Tenant against his Lord who surcharges, for the Tenant shall have an Affize of Common.

Statutes.

Westminster 2. cap. 7. ⁱ *Guardian shall have Admeasurement of Dower; and also the Heir at full Age, if the Guardian brings it and pursues it faintly.*

^h F. N. B. 125. c.

ⁱ This is intended where the Heir within Age, before the Guardian enters into the Land, assigns to the Wife more Dower than she ought to have. F. N. B. 148. f.

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In Admeasurement of Dower and Pasture, Proceſs after Grand Diſtreſs, ſhall be Proclamation two County-Days, and for Default Admeasurement.

Vide Weſtmiſter 2. cap. 8. *A Writ de ſecunda ſuperoneratione ſhall iſſue, where after Admeasurement be ſurcharges: And it ſhall be judicial, if the Admeasurement was before the Juſtices, or otherwiſe Original.*

4. *Nativo habendo*, for the Lord, when his Villain, in whom he hath an Eſtate of Inheritance, flies from him, but not if he hath an Eſtate for Life, or Years, only in him, becauſe this Writ is in it's Nature a Writ of Right, to recover the Inheritance he hath in the Villain^k.

The Form is, *We command you, that juſtly, and without delay, you cauſe A. of B. to have C. his Villain and Fugitive, with all his Catle and his whole Train, whereſoever he ſhall be found in your Bailiwick, unleſs he ſhall be found in our Demefne, who fled from his Land, ¹ within 60 Years now laſt paſt; and we prohibit, upon our Forfeiture, that no one unjuſtly detain him.*

Summons and Severance does not lie here^m, and this is *in favorem libertatis*.

If the Defendant pleadⁿ that he is free, the Sheriff ſhall not proceed; and for this Cauſe the Plaintiff^o ſhall have a Writ *de Libertate probanda* to the Sheriff, to adjourn the Plea before the Juſtices in Eyre; and therefore this ought to be brought before any *Pone* delivered by the Lord to the Sheriff, to remove the Plea^p; and this is a *Superſedeas* to the Lord, that he ſhall not proceed until the Day of Adjournment, nor ſhall ſeize the Villain, until the Plea be diſcuſſed.

The Form is, *A. and B. her Siſter have ſhewed unto us, that whereas they are free Women, and ready to prove their Liberty, F. claiming them to be his Nieces unjuſtly vexes them; and therefore we command you, that* [119] *if the aforeſaid A. and B. ſhall make you ſecure, touching the proving their Liberty, then put that Plea before*

^k F. N. B. 77. a.

¹ Before 32 H. 8. cap. 2. the Time of Limitation was, "After the Coronation of the Lord Henry, Son of King John."

^m Old N. B. 46.

ⁿ F. N. B. 77. c.

^o F. N. B. 77. f.

^p Old N. B. 46.

our Justices at the first Assizes, when they shall come into those Parts, because Proof of this kind belongeth not to you to take; and in the mean time, cause the said A. and B. to have Peace thereupon, and tell the aforesaid F. that he may be then there, if he will, to prosecute his Plea thereof against the aforesaid A. and B. and have there this Writ. Witness, &c.

Statute.

25 Ed. 3. cap. 18. *The Lord may seize the Body of the Villain, notwithstanding the Writ of Libertate probanda be depending.*

5. *Rationabilibus Divisis*, for the Lord, upon whose Land or Waste another Lord, whose Seigniorship is adjoining in another Town, hath by little and little encroached within Time of Memory until now, against the Lord who so encroaches. But if the Encroachment was all at one Time, be it now, or a long Time before, there an Assize of Novel Disseizin lies, and not this Writ¹.

The Form is, *We command you, that justly and without delay, you cause reasonable Bounds to be set between the Land of A. of B. in C. and the Land of D. of E. in F. as there ought, and have been used to be, whereupon, he, the said A. complains, that the aforesaid D. draws more thereof to his Fee than belongs to him to have, that we may hear no more, &c.*

6. *Homine replegiando*, for him that is wrongfully imprisoned, or detained in Prison; as if he isailable, or if he be claimed as a Villain, or as in Ward, where in Truth he is free, and out of Ward¹.

The Form is, *We command you, that justly and without delay, you cause to be replevied B. C. and D. whom you yourself have taken, and doth keep taken, as it is said; or whom D. and E. have taken, and do keep taken, as it is said, unless they were taken by the special command of us, or of our Chief Justice, or for the Death of Man, or for our Forest, or for any other Right, for which they may not be replevied, according to the Custom*

¹ Old N. B. 73, 74.

¹ F. N. B. 66. e.

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of England, that we may bear no more Clamour thereof for want of Justice.

7. *Replevin*, for Goods or Chattels distrained^a; and this, according to the Nature of the Plea, doth become a Plea Real or Personal; for upon a Claim of Property, it is Personal; upon Avowry for Services, or Rent in Arrear, &c. it is Real, and it is as strong as a *Præcipe quod reddat*, inasmuch as it is to have a Return; and therefore he shall here have Aid before any Plea pleaded, as in a *Præcipe quod reddat*.

The Form is, *We command you, that justly and without delay, you cause to be replevied to B. his Cattle (if they are live Cattle, and more than one Beast) his certain Horse, or his certain labouring Beast, or his Ox^b, (if he takes but one Beast) his Goods and Chattels, (if a Man takes a dead Chattel) and in the Count the Plaintiff ought to declare of divers Things, and if he take but one Thing, which is a dead Chattel, then the Writ is, his certain Net, or a certain Swarm of his Bees, or a certain Iron of his Mill, which D. took and unjustly detains, as it is said; and afterwards thereupon cause him justly to be removed, that we may bear no more Clamour thereupon, for want of Justice.*

Statutes.

Vide Westminster 2. cap. 2. *The Sheriff, before Deliverance, shall take Pledges of making the Return of the Beasts, as well as of prosecuting.*

Where upon Default of the Plaintiff, he might have Replevin infinitely at the Common Law, now in a Writ of Retorno habendo to the Defendant, it shall be inserted, that the Sheriff shall not deliver them without Writ^c, in which mention shall be made of the Judgment which the Justices have given. And if the Plaintiff bring such Writ, and make Default, or that otherwise the Return be adjudged to the Defendant, it shall be irrepleviable.

Vide 1 & 2 P. & M. cap. 12. *Every Sheriff shall make four Deputies to make Replevins.*

^a F. N. B. 68. d.

² Inst. 312.

^c 4 H. 6. 30. b.

^d Plowd. 229.

^e Which is intended of a Judicial Writ of

second Deliverance.

21 H. 8. cap. 19. *The Avowry, Conusance, or Justification (where the Lord distrains) may be upon the Land, and not upon the Person, as in a Rent-Charge.*

The Defendants shall recover Costs and Damages, if the Matter be found for them, or the Plaintiff be Nonsuit, or otherwise barred.

Every other Matter shall be as before; Pleas of Disclaimer only excepted.

Here, that is to say, in Replevin sued in the County Court, if the Goods are esloigned, so that at the Suit of the Tenant they cannot be restored (as being chased to a Fortrefs, or Castle, or out of the County, &c. by which the Sheriff, upon the *Pluries*, returns that they are esloigned) Process of *Withernam* shall issue; which is for the Plaintiff to have the Goods of the other, until his own be restored^x.

The Form is, *The King to the Sberiff, &c. Whereas we have many Times commanded you, that justly, &c. to A. his Cattle, which B. &c. or signify the Cause, &c. wherefore you would not, or could not, execute our Commands many Times directed to you thereupon, and you have signified to us, that after the aforesaid B. took the Cattle, of the aforesaid A. and in your County, he drove them from the County aforesaid, into the County of B. wherefore you could not replevy them to the same A. We being willing to oppose the Malice of him the said B. in this Behalf, com-* [120]
mand you, that you take the Cattle of the aforesaid B. in your Bailiwick in Withernam, and distrain them until you can replevy to the same A. his Cattle aforesaid, according to the Law and Custom of our Kingdom, according to the Tenor of our Commands aforesaid before to you, &c.

Statute.

Vide Westminster 1. cap. 17. *The Sheriff may take the Power of the County, and abate the Castle, or Fortrefs, where the Beasts are, if he that took them will not make Deliverance.*

Upon the *Pluries* not served, the Power of the Sheriff is determined, and the Parties shall plead in Bank. So if the Defendant claims Property. For which Reason, the Plaintiff may have a Writ *de Proprietate pro-*

^x F. N. B. 73. c.

banda to the Sheriff, to enquire to whom the Property belongs, viz. to the Plaintiff or Defendant. And this is a Writ *Judicial* out of the King's Bench, or Common Bench, when the Plea depends there; or an Original out of Chancery^v.

The Form is, *The King to the Sheriff, &c. Whereas many Times, &c. as it is said, or signify the Cause, &c. wherefore, &c. and for that the aforesaid B. avows the Cattle aforesaid to be his own, you could not replevy them to the aforesaid A. as you have signified to us; we being unwilling that the same A. should be defrauded by such false Avowry, of his Cattle or of the Goods aforesaid, whereby he may the less have them repleved to him, if they are his own, according to the Law and Custom of our Realm of England, do command you, that you take with you the Keepers of the Pleas of our Crown, and in the Presence of the aforesaid B. if he will be present (whom we would have you to advise hereupon before-hand) diligently enquire by the Oaths of good and lawful Men of your County, by whom the Truth of the Matter may be the better known, whether those Cattle, or the Goods so taken and detained, be the aforesaid A's or the aforesaid B's. And if by that Inquest, it may appear to you, that the Cattle or Goods aforesaid, are the aforesaid A's, then cause them to be repleved to the said A. according to the Tenor of our Commands before to you thereupon directed. And nevertheless, if the aforesaid A. shall make you secure, then attach the aforesaid B. so that you may have him before us such a Day, wheresoever, &c. to answer us of the Contempt done in this behalf, and the aforesaid A. of the Damage, which he hath sustained by Reason of the Avowry of the Cattle or Goods aforesaid, or thus, by Reason of the Claim aforesaid. And have, &c.*

But if the Defendant doth not claim Property, they shall be delivered; and to do this, the Defendant shall find Sureties, which is called *Gager of Deliverance*; and thereupon the Party shall have a Writ to the Sheriff to make Deliverance.

^v 2 H. 7. 6. F. N. B. 77. c. 31 Ed. 3. Fitz. Replevin 35. Co. Litt. 145. b.

The Form is, *The King to the Sheriff, &c. whereas M. who was the Wife of R. C. in our Court before us, was summoned to answer I. G. of a Plea, wherefore she took three Cows of him the said I. every one of the Price of 10 s. and them yet unjustly detains against Gages and Pledges, and the same M. appearing before us in our said Court, for a certain Reason contained in her Avowry, hath avowed the just taking of those Cows, claiming no Property in the same, and the aforesaid I. asserting in our said Court, that the aforesaid M. is seized of the Cows aforesaid, hath prayed that the same M. may gage Deliverance of those Cows to him the said I. and she the same M. in our Court gaging that Deliverance, found Sureties to wage the same, and hath not yet done it, as we have understood by the Suggestion of the said I. And because it is not known whether the Suggestion of the aforesaid I. be true or not, we command you, that if the aforesaid M. hath not yet delivered the Cows aforesaid to the said I. then you cause those Cows to be delivered to him, and attach the aforesaid M. so that you may have her Body before us such a Day, wheresoever, &c. thereof to answer, and shew wherefore she would not make Delivery thereof, as she heretofore gaged it, and to do and receive further what our Court shall consider in this behalf. And have there this Writ. Witness, &c.*

Lastly, many of the Writs which were before, as well for Real Things to be done, viz. the ^a Writ de Consuetudinibus Et Servitiis, ^b *Seita ad Molendinum*, ^c *Quod Permittat*, ^d *Curia Claudenda*, ^e *Writ of Mesne*, ^f *Dower unde nihil habet*; as also Personal Actions, as Writs of ^g *Annuity*, ^h *Debt*, ⁱ *Detinue*, ^k *Account*, ^l *Covenant*, ^m *Trespas*, *Trespas* ⁿ upon the Case ^o to any Sum whatever, and also ^p *Right of Ward*, may be sued in the County by Justices before the Sheriff, as well as to be returnable in the Common Pleas. But ^q the Writs of *Trespas Vicontiel*, shall not be supposed to be with

^a F. N. B. 151. b. 4 Inst. 266.

^b F. N. B. 123. a.

^c Ibid. 123. f.

^d Ibid. 127. g.

^e Ibid. 135. m.

^f Ibid.

148. b.

^g Ibid. 152. b.

^h Ibid. 119. g.

ⁱ Ibid. 138. b.

^k Ibid. 117. c.

^l Ibid. 145. e.

^m Ibid. 86. g.

ⁿ Ibid.

86. b.

^o Ibid. 86. a.

^p Ibid. 139. f.

^q Ibid. 85. g.

Force; but although ' the Freehold come in question upon a Writ of Trespass, or the like, in the County Court, yet the Court shall not surcease. Otherwise it is in other Court Barons *.

As no Force shall be there supposed, therefore ' no *Capias* lies there, neither in Process, nor in Execution; but this lies in Courts of Record.

Pleas holden by Writ in the County-Court, before the Sheriff with the Coroners, are,

1. *Writ of Odio et Atia*, for him who is in Prison for the Death of a Man, to have the Sheriff with the Coroners, to enquire in full County, &c. by the Oath of lawful Men, whether he be arraigned, that is, accused of it by Malice, or be Guilty. And if it be found, that he is not Guilty, he shall have a Writ to the Sheriff to bail him by twelve Persons his Manu- captors.

[121] The Form of the Writ *de Odio et Atia* is, *We command you, that you take with you the Keepers of the Pleas of our Crown, and in your full County, by the Oaths of good and lawful Men of the same County, by whom the Truth, &c. you enquire whether A. who is taken and detained in our Prison of L. for the Death of W. of which he was accused, be accused of that Death by Hatred and Malice, or because that he is Guilty of the same: And if it be by Hatred and Malice, then by what Hatred and Malice, and if he is not Guilty thereof, then who is Guilty of the same. And the Inquest thereupon send to us, without delay, distinctly and plainly, under the Seals of them, by whom it was taken, as you or he shall be willing to warrant it, and this Writ; unless he has been indicted, or appealed before our Justices, in the last Circuit in those Parts, and for the same is taken and imprisoned.*

* Ante 117. a. Bro. Jurisdic. 98. 14 H. 8. 15. b. * Vid. Post. 123. b. 3 H. 6. 54. b. Ante. 117. b. † Note, *Atia* signifies malicious Vexation, from the Greek Word *Ατν*, Damage, whereof Homer elegantly speaks in *Iliad*, Τ. Περσβα δις θυγάτηρ *Ατν* η πάντας αταται.

Statutes.

Vide Magna Charta, cap. 26. *This Writ shall be granted gratis.*

Vide Westminster 1. cap. 11. *Such Inquests shall for the future be taken by honest Men chosen by Oath, whereof two at the least shall be Knights, who are in no wise of Kin to the Prisoners, nor otherwise suspicious.*

Vide Gloucester, cap. 9. *No Writ shall issue for the future out of the Chancery for the Death of a Man, to inquire if one Man killed another, or in other manner without Felony; but he shall tarry in Prison until the coming of the Justices in Eyre, or Justices assigned for Goal Delivery, and shall put himself upon the Country before them of the good and ill. And if it be found by the Country, that he did it in his own Defence, or by Misadventure, then shall the Justices make it known unto the King, and the King shall grant him his Pardon if he pleases.*

Westminster 2. cap. 29. *Confirms the Writ de Odio et Atia.*

Vide 28 Ed. 3. cap. 9. *This Writ is maintained.*

2. *Writ of Recaption*^u, when he whose Goods were distrained before for Rent, or Services (but not for Damage Feasant, for there, as often as he finds them on the Land, so often he may distrain them, because every Time is a new Tort and a new Trespass) are again distrained for the same Cause, pending the Plea in the County Court. And this, although the first Distress was lawful, and although the Rent or Service be again in Arrear, or not, for by the first Distress he shall have Return of the Things taken, until he be satisfied of the whole. And in order to have this Writ of Recaption, it behoveth that the Goods distrained be the Goods of the same Party; ^w for if the Lord distrain first the Beasts of his Tenants and afterwards of a Stranger, no Recaption lies, ^x but upon distraining first the Beasts of two Men, and afterwards of one of them, it lies for him whose Beasts are last

^u F. N. B. 71. c.

^w F. N. B. 71. h.

12 Ed. 2. pl. 13.

^x F. N. B. 71. i. 34 Ed. 2. 12.

[b] distrained. So to distrain ^v Beasts, which a Man hath in common with another, and afterwards Beasts which belong to himself alone. Also it behoveth, that he who taketh the second Distress, be the same Person that first distrained; ^a for if the Lord first distrain, and afterwards his Servant or Bailiff, this Writ doth not lie, although the Bailiff make Conufance in the Right of the Lord; for it may be, that the Lord hath not Notice thereof, and the Party hath Remedy against the Bailiff, *viz.* Action of Trespafs; ^b otherwise it is, if it be by his Commandment, or without his Command, if he afterwards agree to it, as if he join in Aid, &c. But this Writ does not lie after Nonsuit in Replevin, for there the Plea is not pending; ^c but before Avowry made, it lies, for the Plaintiff in Replevin may well count that the Defendant took them for the same Cause, and this shall make a good Issue, whereof the Inquest shall well enough take Notice by the Evidence of the Parties. And such Writ of Recaption lies also in the Common Pleas, if he be distrained again by the same Party, and for the same Cause, pending the Suit before them.

But upon Replevin sued by Plaint, or Writ in a Franchise, no Recaption lies, for the King shall direct his Writ to none but the Sheriff. But if the Writ be removed before the Justices by a *Pone*, or *Recordare*, there Recaption lies as well for Distress before the *Pone* or *Recordare*, as afterwards ^d. And in the Writ of Recaption, the Plaintiff shall recover Damages for the second taking only, because this is a Contempt against the Law, for which the Defendant shall make a Fine, if he be convicted before the Justices, or shall be amerced, if the Conviction be before the Sheriff^e; but he shall not recover any Damages for the taking, or detaining of the Beasts; and therefore in this Writ, the Defendant shall not make Avowry, as in Replevin, but only shall justify the taking, as in Action of Trespafs^f.

The Form of the Writ of Recaption (where the Plea is depending in the County before the Sheriff)

^v F. N. B. 72. e. ^a F. N. B. 71. f. ^b F. N. B. 71. f. ^c F. N. B. 72. a. ^d F. N. B. 73. c. ^e F. N. B. 73. d. ^f F. N. B. 72. b.

is, *A.* hath shewed unto us, that whereas you had replevied to the same *A.* without our Writ his Cattle, which *B.* took and unjustly detained, (or, that whereas he hath lately brought to you our Writ of replevying to him his Cattle, which *B.* took and unjustly detained, and you have replevied those Cattle to him the said *A.*) and given him Day until your next County, and had attached the aforesaid *B.* to answer thereupon to the aforesaid *A.* he the said *B.* after that Attachment, again took the Cattle of the aforesaid *A.* upon the same Occasion that he before took them, and detains them as before. And because this is unjust, and manifestly ² against our Peace, we command you, that without delay, you cause the Cattle of the aforesaid *A.* to be delivered, until the chief Plea between them be determined. And if you shall find that the aforesaid *B.* again took the Cattle of the aforesaid *A.* upon the same Occasion that he before took them, and detains them as before, then have the Body of the aforesaid *B.* before you, and the Keepers of the Pleas of our Crown at your next County. And if by your Bailiffs, by whom the Cattle of the aforesaid *A.* were replevied, and by other honest and lawful Men of your County, he can be convicted of a second taking for one and the same Occasion, then^[122] so chastise him the said *B.* by Amercement, that that Chastisement may make others afraid of offending in the like Case.

Where the Plaint is removed out of the County before the Justices by *Recordare*, or *Pone*, the Form is, (after Recital thereof, and of the Recaption, in Contempt, &c.) And because this is unjust and manifestly against our Peace, we command you, that if the aforesaid *A.* shall make you secure, &c. then put by Gages, &c. the aforesaid *B.* that he be before our Justices aforesaid, to answer us concerning the Contempt aforesaid, and to the aforesaid *A.* of the Trespass aforesaid. And have, &c.

² Note, the Writ shall be, "Against our Peace, altho' against the Lord, but not *Vi et Armis*." Vid. 9 H. 6. 1. Fitz. Recaption, 1.

C H A P. XVII.

Of Writs which are to remove Suits out of the County Court.

ALL the Suits before the Sheriff in the County Court, whether by Plaint, or Writ, may be removed into the King's Bench, or Common Pleas, for them to hold Plea, and therefore the Writs have a Summons. And they are removed by the King's Writ out of Chancery to the Sheriff. For a ^a *Recordare*, *Pone*, or the like, are to no other intent, but to remove a Thing into the King's Court, and are in Nature of a *Certiorari*; and upon the Removal, the *Recordare* or *Pone* is determined, for the Plea shall not be holden upon them, but upon the Plaint which is removed, and the first Pledges shall stand. And they ^b are removed without shewing any Cause in the Writ, if the Removal be at the Suit of the Plaintiff, but if it be at the Suit of the Defendant, then not without shewing Cause. As in ^c a *Recordare*, to remove a Plea in Replevin by Plaint, to shew that the Defendant hath avowed for Damage Feasant, and the Plaintiff justifies by reason of Common of Pasture, which is a Plea that concerns the Freehold, and therefore ought not to be without Writ.

The ^d Suits by Plaint without Writ, shall be removed by a *Recordare*, which requireth that the Sheriff in full County record the Suit, and return it under the Seal of the Sheriff, and by four Suitors of the same Court, and also summon the Defendant to be there at the Day; so that this always prefixes a Day in Bank to the Parties.

The Form is, *We command you, that in your full County, you cause to be recorded the Plaint, which is in the same County, without our Writ, between A. and B. of the Cattle of him the said A. taken and unjustly de-*

^a 3 H. 6. 34.
312, 339, 369.

^b F. N. B. 4. b. 70. a. b. 125. f. 2 Inst.
^c F. N. B. 70. b. ^d F. N. B. 70. b.

tained,

tained, as it is said, and have that Record before our Justices at Westminster such a Day, &c. under your Seal, and under the Seals of four lawful Knights of the same County, of them who were present at that Record, and prefix the same Day to the Parties, that they may be then there to proceed in that Plea, as it shall be just. And have you there the Names of the aforesaid four Knights, and this Writ. Witness, &c. Let Execution of this Writ be done, if the aforesaid A. requires it, and otherwise not.

* Nothing shall be removed but the Plaint, altho' they were at Issue. † Every Writ of False Judgment, is a *Recordare* in itself.

The Suits by Writ shall be removed into the Common Pleas by a *Pone*, be it at the Suit of the Plaintiff, or Defendant, Demandant, or Tenant. So ‡ upon a *Nativa habendo* sued in the County Court, if the Defendant alledge that he is free, the Lord is put to remove it by a *Pone*.

The *Pone*, where it is at the Suit of the Plaintiff in Replevin, commands (in the Writ) that the Sheriff summon the Defendant that he be *in Bank*, to answer, &c.^h

But where it is at the Suit of the Defendant, it is but a *Dic Querenti*, which is nothing but the prefixing of a Day to the Parties.

The Form of the *Pone* at the Suit of the Plaintiff is, *At the Petition of the Plaintiff, put before our Justices at Westminster, (or before us wheresoever we shall then be in England) such a Day, the Plea which is in your County, by our Writ between A. and B. of the Cattle of him the said A. taken and unjustly detained, as it is said, and summon by good Summoners the aforesaid B. that he be then there to answer to the aforesaid A. thereupon. And have you there the Summoners and this Writ.*

The Form of the *Pone*, at the Suit of the Defendant is, *Put before our Justices at Westminster such a*

^e 3 H. 6. 30. b. ^f F. N. B. 71. a. ^g F. N. B. 18. ^h F. N. B. 77. c. ⁱ 12 Ed. 4. 11. b.

Day, the Plea which is in your County by our Writ between A. and B. of the Cattle of him the said A. taken and unjustly detained, as it is said, and tell the aforesaid A. that he may be there, if he will, to prosecute his Plea thereupon against the aforesaid B. And have you there this Writ and the other Writ. Witnes, &c. And because the aforesaid B. took the Cattle aforesaid within his Fee, for Customs and Services due to him, as it is said, if the Cause be true, and the aforesaid B. requires it, let Execution of this Writ be done, and otherwise not. And he may shew many other Causes.

[123]

CHAP. XVIII. Of COURT-BARONS.

THUS much of the County-Court: It follows to speak of Court-Barons.

A Court-Baron is a Court of the Lord of a Manor; so that every Manor hath a Court-Baron of Common Right belonging to it. It is holden before his Steward.

A Manor is Land in the Hands of a Lord, of whom many, ^b two at least, hold to do Suit at his Court there. For, for ^c Suit to Court a Man shall be distrained, not amerced, which proves this to be Suit-Service; but for Suit ^d real, which is to come to the Leet, or the like, he shall be amerced, and not distrained. Yet a ^e Tenure to come to the Court-Leet or Hundred, and to do there any especial Service, as to be a Crier, &c. is a good Service, and not Suit real. And ^f every Suit-Service is intended to be to the Court of a Manor. But a ^g Man may not at this Day make such a Manor, notwithstanding that he give Lands to many severally in Tail, to hold of him by Service and Suit to Court; for he may make a Tenure, but not a Court: For a Court may not be but by Continuance of Time whereof the Memory of Man runs not to the contrary. And this Court is most properly called a Court-Baron.

^a 34 H. 6. 49. Owen 35. ^b 33 H. 8. Bro. Comprise 31. Suit 17. ^c Old Tenures, tit. Suit-service. ^d Ibid. ad verbum. Ante 116. b. ^e 12 H. 7. 18. b. ^f 21 Ed. 4. 25. ^g 33 H. 8. Bro. Comprise 31. 35 H. 8. Bro Tenure 102. Co. Comp. Copyh. sect. 31.

Statute.

Vide Marlbridge cap. 9. *If any Inheritance, whereof but one Suit is due, descend unto many Heirs, he that hath the eldest Part shall do the Suit, and the others shall contribute.*

If there are many Feoffees of Inheritances, whereof but one Suit is due, the Lord shall have but that one, and the Feoffees shall contribute.

This ^b Court shall be holden no oftener than every three Weeks. But, so that it be not oftener than from three Weeks to three Weeks, it may be kept as often as it pleases the Lord. And ⁱ therefore a Tenure of J. S. to do Suit at his Court of D. at Michaelmas and at Easter, shall be intended at his Court-Baron; for altho' the Court-Baron be commonly kept from three Weeks to three Weeks, yet Suit of this Court may be once, twice, or three times in a Year, according as it is reserved at first. [b]

All the Proceeding herein is as in the County-Court, to the Example whereof it conforms itself, that is to say, The Pleas are holden by Plaint; The ^a Suitors are Judges, not the Steward; the Trial ^b by Wager of Law; Execution ^c only by Distress. If any thing ^d which touches the Freehold comes in question, the Court shall not proceed; and therefore ^e if it be in a Plaint of Trespass, there is no Remedy for the Plaintiff, for a Man shall not have a Writ of Trespass Vicontiel there, as he shall have in the County-Court: False Judgment lies there, and not Writ of Error, &c.

Replevin ^f may be sued there, and also in the Hundred-Court, by Writ, as well as in the County-Court; but they shall never award Withernam.

And the Pleas shall be removed by *Recordare* or *Pone*, as in the County-Court.

The ^e *Recordare* which serves to remove the Suit by

^a Bro. Leet 32. ⁱ 21 Ed. 4. 25. ^a 6 Ed. 4. 3. 1 Rol. Abr. 543. E. pl. 2. 12 H. 7. 16. Co. Litt. 58. a. 4 Co. 26. b. 33. b. ^b 12 H. 7. 18. b. ^c 22 Aff. pl. 72. Fitz. Execution 110. Bro. 80. 4 H. 6. 17. b. Bro. Court-Baron 6, but a *Qu.* made, for it is usual for Suitors assigned by the Steward to tax the Sums, and then to award a *Levari facias*. *Qu.* if by Custom, or by Common Law?—By 1 Brownl. 81. Upon a *Levari* out of a Court-Baron, Goods cannot be sold without a Custom to sell, &c. Vid. Noy 17. 20. 1 Rol. Abr. 543. F. pl. 1. Acc. ^d 22 Aff. pl. 64. ^e 14 H. 8. 15. b. ^f F. N. B. 70. a. b. ^g F. N. B. 70. b. 18. d.

THE THIRD BOOK

Plaint here, is called an *Accedas ad Curiam*, because it requireth that the Sheriff with four Suitors go to the County-Court, or Hundred-Court, and there record the Suit.

The Form is, *The King to the Sheriff, &c. We command you, that having taken with you four discreet and lawful Knights of your County, you go in your own proper Person to the Court of W. of C. and in that full Court cause to be recorded the Plaint which is in the same Court, without our Writ, between, &c. and have that Record under your Seal, and the Seals of four lawful Men of the same Court who were present at that Record, &c. and to the Parties, &c. prefix the same Day that they may be then there, &c. Because the aforesaid A. is Bailiff of the aforesaid W. of C. of his Court aforesaid, and holds his Pleas of the same Court, and ought not to be a Judge in his own Cause.*

Every ^b false Judgment here is an *Accedas ad Curiam* in itself. And this also is in all respects as the *Recordare*, viz. it prefixes a Day to the Parties, &c.

The ¹ *Pone*, which is to remove the Replevin there by Writ, shall never be without shewing Cause, altho' that it be at the Suit of the Plaintiff.

CHAP. XIX.

[124]

Of the Writ of Right Patent.

NOW in a Court-Baron of a Manor ^{*} Plea may be holden by Writ of Right Patent, not inclosed in the Seal: And all the Proceeding shall be as in a *Precept in Capite*, viz. a Precept shall be in nature of a *Grand-Cape*, or *Petit Cape*; Trial by Battle, or the Grand Assize, &c. And this is for the ^a meer Right of the Tenements holden of the same Manor; as Land, ^b Advowson, or ^c Rent-service, but not for ^d Rent-charge, Rent-seck, or ^e Common. But ^f if he do not

^b F. N. B. 18. d.¹ F. N. B. 70. a.^{*} Old N. B. 1.² Inst. 143.^a F. N. B. 1.^b F. N. B. 30. a.^c 14 Ed. 3.

Fitz. Droit 31.

^d Ibid.^e F. N. B. 1. b.^f F. N. B. 3. c.

8. a. b.

hold

hold any Court, or otherwise remit ^z his Court to the King for that Time, at the Prayer of the Tenant or Demandant, then it may be in the King's Court with this Clause, "*Because B. the Chief Lord hath remitted to us thereof his Court.*"

^h The Writ ought to shew by what Services the Land is holden.

The Form is, *Command A. that justly, &c. he render to B. one Messuage with the Appurtenances in D. which he claims to be his Right and Inheritance, and to hold of Us in chief, and whereof he complains that the aforesaid A. unjustly deforces him, &c. and unless he will do it, and the aforesaid B. shall make you secure of prosecuting his Claim, then summon by good Summoners the aforesaid A. that, &c.*

And this Writ always remains with the Party himself; so does not any other Writ original ^{*}.

If the Tenant ⁱ vouches one out of the Power of the Court (which is called a foreign Voucher) or ^k joins the Mise upon the Grand Assize, he shall have a *Superse-deas* to respite the Matter until it be determined before the King's Justices, which some term a Writ of Peace.

The Form is, *The King to his Bailiffs of K. Greeting. A. hath shewed unto us, that whereas B. demands against him in our Court of K. one Messuage, &c. in K. by our Writ of Right, and the same A. by the Assistance of our Court therein, hath vouched to warranty against the aforesaid B. C. a Foreigner, who hath no Lands or Tenements within the City aforesaid, whereby he may make that Warranty, as it is said, and hath brought to our Sheriff of Lincoln our Writ to have that Warranty before our Justices at Westminster, on the Octave of St. Hilary next to come, to be pleaded against the aforesaid C. according to the Law and Custom of our Realm of England. Nevertheless,* [b] *you do proceed in the Plea aforesaid, in the same Court, against the Law and Custom aforesaid; and therefore we command you, that, if it is so, then that you cease to hold any more that Plea in the Court aforesaid, until the Plea*

^z F. N. B. 2. f.

^h F. N. B. 1. i.

^{*} F. N. B. 4. d.

ⁱ 13 Ed. 3. Fitz. Voucher 269.

^k Temp. Ed. 1. F. Droit 45.

F. N. B. 4. e.

of the aforesaid Warranty in our said Court before our Justices aforesaid thereof between them be determined, according to the Law and Custom of our Realm of England.

^a But if he do not bring this Writ at the next Day after such Voucher, or Mise joined, he shall lose his Warranty, the ^b Reason is, because the Lord cannot make a Grand Assize to come: But if Battle be joined, this shall be determined there. And ^c after such Writ brought, the Plea may proceed with the License of the Justices; as if the Vouchee comes before them, and enters into Warranty, they may award, that he shall go to the Lord's Court, and there warrant to the Par y who vouched him, and assign a Day certain for the Court to be holden, and also to give License and Power to the Lord to hold his Court.

If of ^d Privies in Blood, not ^e past the third Degree, one Coparcener enters into the whole after the Death of the Ancestor, who ^f died not seized in Demesne (whether that he was ^g disseized, or that he leased for Life, and died in the Life of the Lessee, and after the Death of the Lessee, one Sister (or one Brother, if the Land be in Gavel-kind) enter'd into the whole) there such Writ of Right Patent, for the other Coparcener, is called a Writ of Right *de rationabili parte terræ*, and there the Grand ^h Assize or Battle shall not be joined for the Privy of Blood. Also ⁱ View nor Voucher doth not lie, neither is ^k Non-Tenure any Plea; for this is but to try the Privy of Blood, ^l as in a *Nuper obiit* before.

The Form is, *We command you, that without Delay you do full Right to B. who was the Wife of C. of the third Part of ten Acres of Land with the Appurtenances in W. which she claims to hold of you in Dower by the Free-service of the third Part of one Penny by the Year for all Services, whereof C. unjustly desorceth her, &c.*

A Woman who hath received Part of her Dower

^a Temp. Ed. 1. F. Droit 45. ^b Ibid. ^c 13 Ed. 3. Fitz. Voucher 269. ^d Old N. B. 10. ^e F. N. B. 9. b. ^f Old N. B. 10. b. ^g Ibid. Plowd. 306. ^h F. N. B. 9. b. ⁱ Old N. B. 10. F. N. B. 9. g. Plowd. 306. ^j Ante 7. b. ^k F. N. B. 9. n. ^l Ibid. & 197. c. d. ^m 7 H. 6. 8. ⁿ Ante 92. b. Plowd. 306.

shall have a Writ of Right of Dower Patent, for the Remainder whereof she shall be endowed; in which the same Things are to be observed, which were specified in the Writ of Dower *unde nihil habet*^m.

The Form is, *We command you, that without Delay you do full Right to W. of F. of ten Acres of Land with the Appurtenances in F. which she claims to be her reasonable Part, which falls to her, of the Freehold which was J.'s her Father, or Mother, Uncle, or Aunt, or her Cousin, in the same Town, and to hold of you by the Service of the third Part or the fourth Part of one Penny by the Year, for all Service whereof B. and S. unjustly desorce her.*

^a The Parol in the Writ of Right Patent shall be removed into the County Court at the Suit of the Demandant by Precept of the Sheriff to the Bailiff of the Manor, without any Cause shewed. Which Precept is called a *Tolt*; and therefore ^o every Writ of Right Patent hath this Clause, *And unless you will do it, let the Sheriff do it.* But the Tenant may not remove the Plea by a *Tolt* out of the Lord's Court into the County-Court, but he ought to remove it into the Common Pleas by *Recordare*. But inasmuch as the Demandant may have a *Tolt*, he shall never remove it immediately into the Common Pleas. [125]

When it is once so removed, that is to say, into the Court by a *Tolt*, then it shall be removed also into the Common Pleas by a *Pone*, as a *Justicies*, or the like Writ.

The Form of the *Tolt* is, *Robert A. Sheriff of Norfolk to Edmund C. Bailiff of the Lord the King of his Dutchy of Lancaster of F. Greeting. Because I have received Information from the Complaint of John B. personally appearing at my County (to wit) on Monday next after, &c. in the Year, &c. held in the Shire House at Norwich, that altho' he brought to J. P. and J. B. Bailiffs (of the said Lord the King of the Dutchy aforesaid) of F. aforesaid, the Lord the King's Writ of Right Patent directed to the Bailiffs of the said Lord the King, of his Dutchy of Lancaster of F. in my County, for the purpose*

^m F. N. B. 7. e. ^a Old N. B. 2. F. N. B. 3. g. ^o Regist. 5. F. N. B. 4. a.

that

that they might do full Right to the said John B. of the Manor of F. with the Appurtenances whereof John S. deforceth him; yet because the said Bailiffs favour the said John S. in that Matter, and have hitherto delayed to do full Right according to the Exigency of the same Writ, I command you, on Behalf of the Lord the King, firmly enjoining that you go in your proper Person to the Lord the King's Court of his Dutchy aforesaid of F. and remove the Plaint which is there between the said John B. and John S. by the said Writ in my County next to be held, and summon by good Summoners the aforesaid John S. that he be at my County of Norfolk, to be held on Monday next coming at N. in the Shire House, to answer the aforesaid John B. thereupon, and have you there the aforesaid Plaint, the Summoners, and this Precept. Dated in my County at Norwich, in the Shire House, on Monday next after, &c. in the Year aforesaid.

[b]

CHAP. XX.

Of the SHERIFF's TURN.

Prerogative.

THE King for Reformation of Offences, that is to say, by way of Indictment, hath two Courts (wherefore they are Courts of Record) to be holden, the one before the Sheriff, the other before the Coroner. And it seems that at the Common Law, before the Statute of Magna Charta, cap. 17. the Sheriff in his Turn, and the Steward in the Leet, might arraign one who was indicted of Felony; and so might the Coroner upon an Indictment *super visum corporis*.

Statutes.

Vide Magna Charta, cap. 17. *No Sheriff, Constable, Escheator, Coroner, or other of the King's Bailiffs, shall hold Pleas of the Crown.*

^p That before the Sheriff is called the Sheriff's Turn; and it is to reform Offences which are common Grievances, as a ^a Robbery, ^{*} Bloodshed, the [†] clipping and

^p F. N. B. 82. ^a 22 Ed. 4. 22. Dalton's Sher. 392. ^{*} 4 H. 6. 19. Fitz Tourn de Vicount 1. 1 Rol. Abr. 542. C. pl. 1. 2 Hawk. Pl. Cor. 67. [†] Dalt. Sher. 392. 2 Finch. 241. but Bro. Leet 26. makes a *Qu.* thereof.

washing

washing of Silver and Gold, Night-walking, not repairing of a Bridge, or not cleansing a Ditch, ^b Affrays and Assaults, &c. but not ^c Murder, or the breaking of the Hedge of another Man, &c. for they are not common Grievances, but a Wrong to a particular Person.

* To this Court every Man, (not Women) of the Age of Twelve Years or more, being within the Precinct, oweth Suit, and shall be here sworn to the Allegiance of the King. And this is called Suit real, which is not due by reason of the Freehold of Men, but of their Bodies, for that they are resident within the Precinct of the Leet. But ^d Women are not compellable to come there, nor to be sworn to the King; and ^e therefore when a Woman is outlawed, she is said to be *waived*, and not *outlawed*, because she was never sworn to the Law.

Peers ^f of the Realm are excepted, and Persons of Holy Church, and other Men of Religion, as appears before.

The Offender shall in this Court be amerced and distrained for the Amercement within the whole Precinct of the County; and therefore the King may have a *Distringas* to levy an Amercement, or the like, by Distress and Sale, be it in the Leet or the Sheriff's Turn, or otherwise ^g.

^h A Presentment here (as also in the Leet) is not traversable after the Day in which it is presented, except ⁱ it [126] touch the Freehold, as that one ought to clean the High-way, or the like, by reason of his Tenure: Therefore the Course is to remove such Presentment as touches the Freehold into the King's Bench by a *Certiorari*, and there he may traverse it.

Statutes:

Vide Magna Charta, cap. 35. *This Court shall be holden but twice in the Year, and in the Place accustomed; once after Easter, and again after Michaelmas.*

^b 10 H. 6. 7. 2 Hawk. Pl. Cor. 67. ^c 22 Ed. 4. 22. ^d F. N. B. 161. a. Bro. Leet 39. 2 Inst. 147. 12 H. 7. 18. 25 Ed. 3. 23. ^e Bro. Leet 39. 2 Inst. 121. ^f Fleta, lib. 1. cap. 27. pl. 12. F. N. B. 161. a. ^g Stat. of Marl. cap. 10. Post. 135. a. ^h 2 H. 4. 24. 8 Rich. 2. Fitz. Avowry 194. ⁱ Dy. 13. pl. 64. 41 Ed. 3. 27. a. ^j Dy. ibid. 5 H. 7. 3. b. Bro. Traverse 183. 2 Hawk. Pl. Cor. 71. 2 Finch 383.

Vide

Vide 31 Ed. 3. cap. 15. Stat. 1. *It shall be holden once in the Month after Easter, and the other Time in the Month after St. Michael. And if they are holden otherwise, the Sheriffs shall lose their Turn for the Time.*

Vide Marlbridge cap. 10. *Peers of the Realm, Men of Religion, and Women, are not compelled to come there, except their Presence be specially required for another Cause.*

Vide Westminster 2. cap. 13. *Sheriffs shall make their Inquiries by 12 at least.*

Vide 1 Ed. 3. cap. 17. *Indictments there shall be by Rolls indented, whereof one Part shall abide with the Indictors, the other with the Sheriff.*

Vide 1 Ed. 4. cap. 2. *The Sheriff shall not proceed upon an Indictment taken there, but shall deliver the Indictments to Justices of the Peace at the next Sessions, and they shall proceed upon them as if they were taken before them.*

Vide 1 Rich. 3. cap. 4. *Every Indictment there shall be void, if every Juror is not of good Fame, and hath not within the County 20 s. a-year of Freehold, or 26 s. 8 d. of Copy-hold.*

Inasmuch as for the better Expedition of Justice the Hundred was divided into ten Towns, and every Town into ten Families, as it is said before, from thence these Towns were called *Decennaries*. In these *Decennaries* every one shall be a Pledge for the other of his good Behaviour; (from whence the Court is also called Court of *View of Frank-pledge*) and if he misbehaves, he who taketh him into his House shall be amerced in the Leet. And the Pledge is called *chief Pledge*, at this Day *Tithingman*.*

CHAP. XXI.

[b]

Of the CORONER'S COURT.

THE Court of the Coroner is in case of the Death of a Man, Rape, Maihem, and Battery, but not of any other Felony; for the Statute of 4 Ed. 1. which is called *Officium Coronatoris*, explains the Office of the

* 6 Co. 77. b.

Coroner to be so at the Common Law, and puts the Order in which they shall proceed in their Inquiry¹.

His Inquiry of the Death of a Man shall be upon View of the Body.

Upon such^m Indictment, (that is to say, of the Death of a Man, taken before the Coroners upon View of the Body) if the Party be arraigned at the Suit of the King, or in Appeal, and be acquitted, the Jury shall say who killed him; but so it shall not be where the Indictment was before the Sheriff or Justices of the Peace, for this is not of Record, as the finding before the Coroner is. And also this doth not hold place in an Acquittal upon an Indictment for the felonious taking of Goods.

Statutes.

4 Ed. 1. Officium Coronatoris. *See there of what Things they shall inquire.*

Vide Westminster 1. cap. 10. *Coroners shall be chosen of the most loyal and sage Knights.*

Vide 14 Ed. 3. cap. 8. *No Coroner shall be chosen, who hath not Land in Fee sufficient in the same County, whereof he may answer to all Manner of Men.*

Vide 28 Ed. 3. cap. 6. *Coroners shall be chosen in full County by the Commons of the same Counties, of the most meet and loyal Men.*

C H A P. XXII.

Of CONSTABLES.

[127]

THE Officer to these Courts, that is to say, to the Sheriff's Turn (and consequently to the Court Leet) and to the Court of the Coroner, is the Constable, who is also a Conservator of the Peaceⁿ; and therefore for preventing the Peace from being broken, he hath Power to^o take Sureties, by^p Obligation, not by Recognizance, of such Persons as he finds making Affrays; and also he may commit the Offender to Prison until he may be indicted, or otherwise duly

¹ 35 H. 6. 27. 2 Inst. 549. 4 Inst. 271. ^m 13 Ed. 4. 3. b. 14 H. 7. 2. b. Bro. Coron. 52. Appeal 42. 37 H. 8. Bro. Appeal 122. Plowd. 12. T. 10. R. 2. Per. 11 H. 4. 93. Bro. Corone 32. Ibid. 39. 37 Aff. pl. 13. Per Green ibid. 117. 22 Aff. pl. 39. Dy. 238. pl. 36. Pulton 207. a. St. Pl. Cor. 181. a. 2 H. H. P. C. 65, 300, 301. 2 H. P. C. 49. ⁿ 12 H. 7. 18. at the Common Law. ^o 10 Ed. 4. 18. b. ^p 22 Ed. 4. 35. b.

punished,

punished, that is, he may arrest a Man that makes an Affray, and put him in the next Goal, or upon reasonable Cause (as if it be in the Night, or there are any there who will rescue him, &c.) he may keep him in the Stocks, until he can be safely carried to Goal, or may ^a arrest him until he find Sureties.

Constable, is the High-Constable, or Petit-Constable.

The *High-Constable*, who is for the whole Hundred.

The *Petit-Constable*, who is but in one Town; who is also called *Borsholder*, *Head-Borough*, *Third Borough*, *Borough-head*, *Titbingman*, or *Chief-Pledge*.

* Every one who suspects another of a Felony committed or intended (as where one lies in wait to rob the People travelling there, and draws his Sword upon one, commanding him to deliver his Money, &c.) may arrest him; so ^t that thereupon he commit him to Goal. And in this Case ^a common Report and Fame that he hath committed a Murder, or the like, or if he was present where a Murder was done, and be found with a Sword in his Hands, or, when a Robbery was done, be found with any Part of the Goods, these are good Causes of Suspicion. So if I will arrest him that hath robbed me, and J. S. says that I shall not arrest him, this is a good Cause to suspect J. S. to be an Accessary. And what is a sufficient Cause of Suspicion, and what not, shall be tried by the Justices. But ^t neither can any Man but the Constable arrest another for a Trespas, nor may the Constable himself arrest him for a Felony, except he ^u himself suspect him (altho' that he doth it by the Command of another who suspects him) and except the same ^v Felony be done in deed, that is to say, if he arrest him for a Robbery, the Thing itself ought to be stolen; for to say, that many Oxen were stolen, and because that he suspects J. S. to have stolen six Oxen, he arrested him, is not good without averring expressly that those six Oxen were stolen.

^a 5 H. 7. 6. 9 Ed. 4. 26. b. * 9 Ed. 4. 26. ^r 20 Ed. 4. 6. ^s 11 Ed. 4. 4. b. ^t 9 Ed. 4. 26. ^u 11 Ed. 4. 4. b. ^v 2 H. H. P. C. 91, 92. is contrary to our Author in this very Point. ^w 27 H. 8. 3. As to this Point agrees 2. H. H. P. C. 92. where note, that the Constable must necessarily aver the Felony to be done in fact (as the Case *infra* put by our A. proves) because the same is issuable.

CHAP.

C H A P. XXIII.

Of the Escheator, and Offices for the King.

IN every County is an Escheator, ^x who hath Power to inquire by a Jury (twelve at least) of Things which concern the King's Revenues, and to find his Title (for an Office is ^a a Title for the King, but if it be found for a common Person, it is only an Evidence) as to Wards, Escheats, Land forfeited, or aliened without License, or the like, and such Offences the Escheator may find ^b as well by his Office, as by virtue of a Writ of Commission: But not ^c of Outlawry, of Felony, or such high Matter of Record without Warrant Paramount and Certificate by Writ of Record.

Statutes.

Vide 14 Ed. 3. cap. 8. *The Escheator shall be chosen by the Chancellor, &c. as it is of Sheriffs, and shall not tarry in his Office above one Year.*

Vide 34 Ed. 3. cap. 13. *He shall take his Inquests of Office by Men that are honest and sufficiently inherited, and of good Fame, and of the same County: And the Inquests shall be indented betwixt the Escheators and Jurors, otherwise it shall be holden for none. Also the Inquests shall be taken in good Towns openly.*

Vide 1 H. 8. cap. 8. made perpetual 3 H. 8. cap. 2. *A Patent for more than one Year, or to be made Escheator within three Years after that Year ended, shall be void.*

When a Title is found for the King, this is called an Office for the King, and may be returned ^d into the Chancery or Exchequer, altho' it is taken *virtute Officii*; for the Escheator ^e is attendant to both Courts.

The ^f Wife of the King's Tenant, where the King by the Office is to have the Land in Ward, shall be endowed in the Chancery. For a ^g common Person Guardian in Chivalry may endow the Wife, and a Writ of Dower

^x 4 Ed. 4. 24. b. He may find an Inquest by virtue of his Office. ^a 21 Ed. 3. 2. ^b 4 Ed. 4. 24. ^c 2 H. 4. 5.

^d 1 Co. 42. b. ^e 4 Co. 57. a. ^f 4 Inst. 225. ^g Ante 78. a. ^h 4 Co. 57. a. ⁱ 9 Co. 17. a. ^j Co. Litt. 35. a. Ante 89. b.

lies against him. But otherwise it was at the Common Law, viz. until the *Statute de Prerogativa Regis, cap. 4.* [128] where the King is to have but *Primer Seizin*, or the like, for there he is not Guardian, and ^a *Dote assignanda* lies for the Wife which is always directed to the Escheator, ^b and may be either to deliver to her such a Part of the Land as is assigned to her in Chancery, or for the Escheator himself to assign her Part to her. ^c If her Husband held *in Capite*, then she shall take an Oath not to marry without the King's License, before that she shall have this Writ. ^d But if the Tenure be of the King by Knight's-service as of a Manor, or of one who is in Ward to the King by reason of his Non-age, there it is not requisite for her to take such Oath.

The King upon Office found for him is presently in possession, viz. without Entry or Seizure, where his Entry is lawful, and the Possession void at the Time; as where it is found by Office, ^e that the King's Tenant died seized without Heir, or his Heir within Age; or that the King made a Lease for Life, or a Gift in Tail, and that the Lessee is dead, or the Donee died without Issue. But if the Office finds, ^f that the King's Tenant was disseized, and died without Heir, the King shall not be in Possession, until the Possession and Seizin of the Ter-tenant be removed. Or if the Office finds, that the King's Tenant hath ceased, or that his Tenant for Life hath committed Waste, this doth not vest any Possession in the King, because his Entry is not lawful, but he is put to sue a *Scire Facias*. So of an Office, which intitles the King to a Thing ^g not manual, that is to say, whereof no Profit is to be taken immediately until it happen, as Rent, Common, &c. there the King is not in possession by Office until the Day.

Also he shall be answered of all the Mesne Profits from the Time of his Title, that is to say, ^h upon an Alienation in Mortmain found by Office, from the Time of that Alienation which appears by Record, ⁱ upon

^a F. N. B. 263. c.

^b F. N. B. 263. d.

^c F. N. B. 263. c.

^d F. N. B. 264. a.

^e 14 H. 7. 23, 25.

^f 9 H. 7. 2. 4 Co.

58. a. Plowd. 229.

^g 4 Co. 58. a.

^h Stamf. Prær. 54. b.

ⁱ 41 Ed. 3. 11.

^j 11 H. 4. 5.

Letters Patent of the King annulled for Insufficiency, from the Time of the Grant.

An Office for the King is in nature of a Declaration, to which a Man may plead, that is to say, he may traverse, or confess and avoid it by shewing his Right, * where the Office intitles the King by Matter in Deed, that is, by no Record but that only; as upon an Office found that J. S. the King's Tenant died seized, the Party grieved may either traverse it, to say that J. S. died not seized, or confess and avoid, to say that he himself was the King's Tenant, and was disseized by J. S. and so J. S. died seized being in by Disseizin; or that he infeoffed J. S. upon Condition, and that J. S. before his Attainder broke the Condition; and this is called a *Monstrans de Droit*. But if the Office intitles the King by Matter of Record, ^k as that J. S. was attainted of Treason, and seized of certain Lands, there Petition only lies to the King, because this is a double Matter of Record, and no Traverse nor *Monstrans de Droit*. All this is to be intended, so long as the Record of the Attainder remains in its Force; but the Party may traverse ^l the Attainder, as to say, "*No such Attainder*;" and this being found for him, he shall have his Land without being put to Petition, otherwise not. And the Reason is, that inasmuch as the Office intitles the King by Matter of Record, this Title shall not be avoided but by Matter of as high a Nature, and not by Plea or Allegation of the Party. [b]

^m And altho' the Office finds the Title of the King to be by Matter of Record, when either the Party hath as high Matter of Record to avoid the Office, as the Office itself is (as upon an Office found that J. S. was attainted of Treason by Parliament, and his Lands forfeited, and that he was seized of black Acre, by which the King seized the same, now if another Act of Parliament restore the Heir to all the Lands of which his Ancestor was seized, and annuls the Attainder of the Ancestor, the Heir shall have this by way of Plea without Petition;) or when the Office intitles ⁿ the King to per-

* 3 H. 7. 3. ^k Ante 76. b. 77. a. ^l 4 H. 7. 7. b. ^m 4 Ed. 4. 25. 4 H. 7. 7. b. Ante 4. b. ⁿ 4 Ed. 4. 24. 2 Inst. 689. B b 2 sonal

sonal Goods (as that J. S. was attainted of Felony or Treason, or outlawed in Debt or Trespass, and was at the time possessed of a Horse, or the like, where indeed the Property was in a Stranger, that Stranger shall have a Traverse) in this Case (*viz.* by that Traverse, or pleading of any Matter to it) he shall have his Goods again, ^o except the Escheator hath accounted for them in the Exchequer before.

Statutes.

34 Ed. 3. cap. 14. Stat. 1. *Where Land is seized into the King's Hands by Office of the Escheator taken by the Commandment of the King, which finds Alienation without License, or the Heir in Ward, and the same certified into Chancery, the Party grieved shall have Traverse, and it shall be sent into the King's Bench to be tried.*

Vide 36 Ed. 3. cap. 13. *Upon an Office before the Escheator, a Man shall have a Traverse, or Monstrans de Droit in the Chancery, and then it shall be sent into the King's Bench to make final Discussion, without attending any other Command.*

23 H. 6. cap. 17. *Upon Traverse of an Office and Scire Facias against any Patentee, no Protection shall be allowable.*

2 Ed. 6. cap. 8. *Tenant for Years, Copy-holder, and he that hath Rent or other Profit out of Land, which are not found by the Office or Inquest which intitles the King to Wardship by Tenure in Capite, or by any Attainder, shall have them, as if no such Office had been found^p.*

Where the Heir of full Age is found within Age, there he may have an Ætate probanda, and shall sue Livery, or Ouster le Maine, and shall be restored to the Profits. So if the Heir being within Age be found to be of lesser Years than he is in reality, he, at his full Age, shall have the same Remedy as is next before mentioned, and shall be restored to the Profits from the Time of his very full Age.

If one be found Heir where another should be Heir, or if one be found Heir in one County, and another in another County, or if one be found Ideot, Lunatic, or dead, there

^o 4 Ed. 4. 24. 34 H. 6. 5. Ante 77. a. ^p Vide Co. Litt. 77. b.

the Party grieved shall have Traverse at what Time he will, and shall proceed to Trial, as in Case of other Traverses.

Where the King is intituled by Office, or double Matter of Record, to Lands by the Attainder of one where another hath right to them, there he shall have Traverse or Monstrans de Droit, and shall not be put to Petition.

Where such Office is found (to wit, of whom the Tenements are holden they know not, or by what Services they know not) there the same shall not be taken for any immediate Tenure of the King, or for a Tenure in Capite, but a Melius inquirendum shall be awarded. [129]

Where Lands are found to be holden immediately of the King, the Heir being within Age shall have his Traverse and Restitution.

The other Lords shall have their Rents of the Officers upon Request, and giving Acquittance during the King's Possession, without distraining the Heirs at full Age.

Where a Man is to have his Traverse, as before, there he shall have also a Scire Facias against the Patentee.

Also, upon a Traverse pursuant to this Statute, there shall be two Writs of Search, that is to say, in Case where the Party at the Common Law ought to be put to Petition.

After Judgment, upon a Traverse, if other Right appears by any Matter of Record for the King, this shall be saved to the King.

The King may award Writs or Commissions in nature of such Writs to find his Title: but they^a are always returnable into the Chancery, because the Writ or Commission issues out of that Court.

Where the Interest of the King found by Office is but for a Time (as in Ward, for Primer Seizin, upon Alienation without License, or the like) the Party, when his Time comes, is to sue to have the Lands out of the King's Hands by the King's Writ.

The Writs are, Writ of Livery, or Ouster le Main.

Writ of Livery^b is for the Heir after a Tenure in

^a 4 Ed. 4. 24. Stamf. Prerog. 70. b. 2 Inst. 225. But Offices found virtute Officii are returnable either into the Chancery or Exchequer. Ante 127. b. 1 Co. 42. Against Stamf. ibid. ^b F. N. B. 251. k.

chief found, whether in Soccage or by Knight's-service; and whether the Heir be within Age at the Time of the Office found, or of full Age; but^c the Office ought to be perfect, for there shall be no Livery upon an insufficient Office. The Manner of which is such, * when the Heir in Ward of the King is of full Age, he shall have a Writ out of the Chancery to the Keeper of the Privy Seal, witnessing that he is of full Age, and thereupon he shall have a Privy Seal to the King's Chamberlain, to receive his Homage; and when he hath received his Homage, he shall have a Writ from the Chamberlain to the Chancellor, witnessing that he hath received his Homage; and thereupon he shall have a Writ of Livery.

And this Writ is to deliver all the Lands together; for Livery is intire, and shall not be by Parcels[†].

If the Heir be found within Age and in Ward, he shall have a Writ *de etate probanda*, to prove himself to be of full Age, before he shall have Livery[‡].

[b] When two are found Heirs by one same Title (whether^d Twins-male found Heirs by the same Office, or divers^e Men by divers Offices found Heirs to the same Ancestor, and by the same Title (for if one Office finds that the King hath given Land to A. and to the Heirs of his Body, and that B. is his Cousin and Heir, and another Office finds that the Gift was in general Tail, and that four Daughters are his Heirs, there shall be a Traverse, and no Interpleader, because they do not claim by one same Ancestor and Title) there the King shall not make Livery until by Interpleader the Truth be discussed at the full Age of him who was first found Heir; ^f for if A. of five Years of Age be found Heir to the King's Tenant, and afterwards by another Office B. is found his Heir, and of full Age, B. hath not any Remedy until A. be of full Age, and then they shall interplead; so in every Interpleader Office ought to be found for both. Also upon one being found Heir of full Age, and afterwards another within Age, the In-

^c Stamf. Prerog. 51. b. Co. Litt. 77. a. * F. N. B. 258.

[†] 2 H. 7. 12. Co. Litt. 77. a. [‡] F. N. B. 257. d.

H. 7. 28. ^d 21 H. 7. 35. ^e 5 Ed. 4. 4.

terpleader shall not tarry until the full Age of the second, for that the other was found Heir first.

^s Between Coparceners, the King, upon the Livery, shall make Partition; and this is for the Benefit of the King, because upon this Partition each shall have Part of the Lands *in Capite*; for if any of them should have for her Part only the Lands holden of others, then the King should lose his Prerogative in those Lands for ever, for that they, who have the same Lands, should not, when they died, hold any Lands of the King *in Capite*; and therefore in the Writ of Livery is a *Proviso*, that each shall have for her Purparty Parcel of the Lands holden *in Capite*.

See the Statutes of Livery, and of Ouster le Maine.

^h No Livery shall be had upon an Office found by the Escheator *virtute Officii*; but upon a ^a perfect Office *virtute Brevis seu Commissionis*, ^b if it be a special Writ or Commission, Livery shall be had, but not if it be a general Writ or Commission, as to inquire of all Wards, or the like.

And to the intent that the Heir may have Livery hereafter, Writs of two Sorts lie here, to inquire after the Death of his Ancestor.

The Writs of the first Sort are, ^{*} to inquire of what Lands holden of the King, and of what Lands holden of any other, the Ancestor was seized the Day of his Death, the Value, the Day when he died, who is his next Heir, and of what Age.

Such are, *Diem clausit extremum*, *Mandamus*, and *Devenerunt*.

Diem ^c *clausit extremum*, is to be sued within the Year after the Death of the Ancestor.

Mandamus, ^d after the Year.

And here ^e they ought to inquire who takes the Profits.

Devenerunt ^f is when the Ancestor died in Ward of the King.

^g Stamf. Pre-og. 58. b. ^h 14 Ed. 4. 5. ² Inst. 690. ⁶ H. 7. 15. ^a Stamf. Prerog. 51. b. ^b F. N. B. 253. d. ^{*} F. N. B. 253. ^c 14 Ed. 4. 5. ^d Kelwey 199. a. ^e Stamf. Prerog. 52. a. ^e F. N. B. 253. b. ^f Kelwey 199. a. ^f Stamf. ibid.

The Writs of the other Sort, are those which are upon any Defect in the first Offices; as *Quæ plura*, *Melius inquirendum*, and *Datum est nobis intelligi*. Every of them issues ^s upon Office found *virtute Brevis*, or *Commissionis* only, not *virtute Officii*.

^b *Quæ plura*, when any Land is omitted in the Office.

[130] *Melius inquirendum*, upon any other Defect in the Office, as if the Office was insufficient ⁱ or incertain, or the Land ^k of greater Value than was found in the Office, or holden by other Services, or the Ancestor seized of any other Estate.

Datum est nobis intelligi, is upon an Office which finds the Land to be holden of some other Person, when there is a Record to prove that it is holden of the King; but this Writ doth not issue upon a bare Surmise^l.

Hitherto of Writs of Livery, and the Writs which the Law allows, to the intent that the Heir may have Livery; which if it be mis-sued, *viz.* upon insufficient Office, or if any Parcel, as Advowson, or the like, be omitted in the Livery, the King shall seize the whole, and shall be answered of all the Mesne Issues^m.

Ouster le Maine shall be had in all other Cases, where Livery is not to be had. As where Land is found to be holden in Chivalry, but not in Capite, and that the Heir is within Age; for there altho' no Livery shall be sued, yet inasmuch as none may enter upon the King, the Heir when he comes of full Age, shall have an *Ouster le Maine*ⁿ.

Statutes.

Articuli super Chartas cap. 19. *For the future, where Land is seized into the King's Hands, and afterwards removed out of his Hands, by reason that he hath no Cause to seize, nor to hold, the Issues shall be fully restored to him to whom the Land ought to remain, and he shall have the Damages he hath sustained.*

29 Ed. 1. Stat. of Escheators. *Upon Office virtute Brevis returned into the Chancery which finds for the King*

^s Vid. 2 Inst. 691. contra. ^b F. N. B. 255. a. ⁱ 4 Ed. 4. 24. ^k F. N. B. 255. ^l 2 H. 7. 2. ^m 44 Ed. 3. 25. b. ⁿ 32 H. 8. Bro. Livery 62.

to have the Ward, there shall be an Ouster le Maine cum exitibus; but if Title afterwards appear for the King in the Chancery, Exchequer, or King's Bench, a Scire Facias shall issue against the Party, and the King shall have the Issues from the Time of the Office first found.

Prerogativa Regis, cap. 5. Upon Livery to Parceners, the Inheritance bolden of the King shall be divided, that each may hold her Part of the King.

Vide 28 Ed. 3. cap. 4. Upon Livery, he shall have the Rents due at the next Day of Payment after.

Vide Marlbridge, cap. 16. The Heir, or other, shall not intrude into the Inheritance before Livery, that is to say, of Land which the King hath by reason of Chivalry, or Serjeanty, or by Right of Patronage.

Vide Prerogativa Regis, cap. 13. Where the Heir enters into Land in Capite before Livery, he shall gain no Freehold thereby, nor shall his Wife have Dower.

Vide 39 H. 6. cap. 2. That Women of fourteen Years shall have Livery.

Vide 32 H. 8. cap. 46. and 33 H. 8. cap. 22. The Erection of the Court of Wards and Liveries.

C H A P. XXIV.

[b]

Of the Steward and Marshal of the King's Household, and of the Coroner within the Verge.

THE King for his Household, hath a Steward and Marshal, who have a Court of Record for any Trespas done within the Verge, where one of the Parties is of the Household, and of Contracts and Covenants, where both are of the Household. For the Statute of *Articuli super Chartas* explains the same now, which at the Common Law was not so clear^o.

Also^p they may enquire of Treason, Murder, Felony, Homicide, Blood-shed, &c. and may take Ap-

^o Diversity of Courts, fo. 102. b. 6 Co. 29. b. 10 Co. 69. b. 72. a. Writ of Error shall be of a Judgment there. 7 H.

6. 30. ^p Diversity of Courts, 102. b. St. Pl. Cor. 57. b.

4 Inst. 133. Vide 2 Hales Hist. Pl. Cor. fo. 11, 12.

peals of all Felonies and Maihems; but it seems that this was by special Authority and Commission.

Statutes.

Articuli super Chartas, cap. 3. *The Steward and Marshal shall not for the future hold Plea of Freehold, nor of Debt, nor of Covenant, nor of any Contract made between the King's People, but only of Trespass done within the King's House, and of other Trespasses done within the Verge, and of Contracts and Covenants that one of the King's House maketh with another of the same House, and not elsewhere. That which cannot be determined before the King goes out of the Verge, shall be determined at the Common Law. Any Thing done to the contrary, shall be holden for none.*

5 Ed. 3. cap. 2. *Inquests there shall be taken by Men of the Country thereabout, and not by them of the King's House, except it be of Contracts and Covenants, or Trespasses made by Men of the King's House of either Part, and that in the same House.*

10 Ed. 3. cap. 2. *Accord.*

13 Rich. 2. cap. 3. Stat. 1. *The Jurisdiction shall not pass the Space of twelve Miles to be accounted about the Lodging of the King.*

15 H. 6. cap. 1. *Averment is given to Defendants against the Record, to say, that they themselves, or the Plaintiff, were not, at the Time of the Suit commenced, of the King's House.*

33 H. 8. cap. 12. *All Treasons, Misprisions of Treasons, Murder, Homicide and Blood-shed, perpetrated within the Palace, or Household of the King, shall be enquired, tried, heard, and determined before the Lord Steward of the King's Household only, and in his Absence, before the Treasurer and Comptroller of the Household, with the Steward of the Marshalsea, or two of them, whereof the Steward of the Marshalsea shall be one: And this altho'*
 [131] *the King should be removed before. See there in what manner the Steward of the Marshalsea shall be appointed in Writing, under the Seal of the Lord Steward of the King's Household for the Time being.*

The

The Coroner^a of the King's Household hath the Jurisdiction there, to enquire of the Death of a Man, or the like; and the Coroner of the County may not intermeddle.

Statutes.

Articuli super Chartas, cap. 3. *The Coroner of the King's Household, with the Coroner of the Country, shall sit upon the Death of a Man. And if it cannot be determined before the King departs out of the Verge, it shall be determined at the Common Law.*

Vide 33 H. 8. cap. 12. *Every Inquest upon the View of a Man killed within the House where the King is dwelling, shall be by the Coroner of the House alone, without the Coroner of the County, by a Jury of Yeomen Officers to the King.*

The Coroner shall be appointed by the Lord Steward of the House.

C H A P. XXV.

Of Justices in Eyre, and Justices of Oyer and Terminer.

BESIDES^r the Courts aforesaid, which the Common Law itself hath erected for the Government of the County, the King by his Letters Patent, or Commissions, or sometimes by Writs in Nature of Commissions, may appoint others at his Pleasure.

And amongst all these Commissions or Writs, there lies a Writ of *Association*, and *Si non Omnes*.

^s Writ of *Association*, is for others to be associated to them, as their Companions, and Fellow Justices: And may be directed to the Justices themselves to admit them, or to the Parties themselves that shall be associated, to signify their Association. ^t That to the Party is Patent: The other to the Justices, to admit him, is close.

^a The Stat. of Artic. sup. Cha. so recites it. ² Inst. 550.
⁴ Co. 46. b. ^r 42 Aff. pl. 12. ^s F. N. B. 111. b.
^t F. N. B. 111. d.

* *Si non Omnes* is for some of them to proceed, although the others do not come. And is to be directed, as well to the Party to be associated, as to the other Justices; to the ^v Party it is Patent; to the Justices close.

[b] Such by Commission* were the *Justices in Eyre*, or *Justices Itinerant*, so called, because they made their Circuits through the whole Country, to do Justice in every Matter of Grievance; for they* held Plea according to their Commissions, as well of Matters of the Crown, as of Common Pleas, and that which they could not determine before their Departure out of the County, should be determined in the King's Bench, if it were Matter of the Crown, in the Common Pleas, if it be a Plea of Land: to which Purpose, a *Certiorari* should be awarded to them, to remand there the Records and Pleas. ^v But if the King's Bench came into the County where any Commission in Eyre was, the Eyre should cease, for the King's Bench is more than the Eyre.

See for the Authority and manner of Proceeding of the Justices in Eyre.

Statutes.

14 Ed. 1. Stat. Exon. De Inquisitione facienda super Coronatores.

14 Ed. 1. Artic. super Stat. Exon.

Capitula Justiciariorum in Itinere.

Artic. et Sacramenta in Circuitu.

Marlbridge, cap. 26. *The Vouchee to Warranty before them, if he be within the County, shall have Summons by three or four Days, if out of the County, by 15 Days.*

Such also were Justices of Oyer and Terminer, that is to say, Persons appointed by Writ or Commission to bear and determine upon any heinous Trespass committed, as Rebellions, Assemblies, Insurrections, and the like^z.

^u F. N. B. 111. c.

^w F. N. B. 186. a. b.

^{*} 4 Inst.

184. but they are now vanished away.

^x F. N. B. 243. k.

^y 27 Aff. pl. 1. 4 Inst. 185. 2 H. H. P. C. 4.

^z F. N. B.

110. b. 4 Inst. 163.

Statutes.

Statutes.

Westminster 2. cap. 29. *Such Writ shall not for the future be granted before any Justices, except the Justices of both Benches, and Justices in Eyre, unless it be for an enormous Trespass that needs hasty Remedy. Nor shall it be granted in Appeals before Justices, except in special Cases, where the King commands it.*

2 Ed. 3. cap. 2. *Accord.*

28 Ed. 3. cap. 9. *No Commission or Writ, shall for the future be granted to the Sheriff to enquire, &c.*

Of this Nature also, is the Writ *de Perambulatione facienda* †, which is a Commission by the Assent of both Lords, when one Lord or Town hath encroached by little and little upon another Lord or Town, to put the Bounds in certain, and it may be directed to other Persons, as well as to the Sheriff, and to certify it elsewhere, as well as in the Common Pleas or Chancery. But if such Incroachment was at one Time (now, or a long Time ago) there an Affize of *Novel Disseizin* lies.

The Form is, *We command you, that having taken with you twelve discreet and lawful Knights of, &c. you go in your proper Person to the Land of A. of B. in N. and the Land of C. of D. in E. and by their Oath cause to be made a Perambulation between the Land of him the said A. of B. in N. and the Land of him the said C. of D. in E. so that the Perambulation be made by certain Metes and Divisions; because the aforesaid A. and C. have put themselves before us upon that Perambulation. And make known to our Justices, or the like, the Boundaries.*

C H A P. XXVI.

Of the Court Leet, Court of Piepowders, and [132] Hundred Court.

BY Reason also of Franchises, arise certain other Courts; whereof two are of Record, viz. the Court Leet, and Court of Piepowders*.

† Old N. B. 74. F. N. B. 133. d. Regist. 157. b. Old Lib. Inrat. fo. 128. b. * 8 Co. 38. b. 6 Co. 20. a.

† *A Leet*, when a Man hath, by the Grant of the King, all that which belongs to the Sheriff's Turn, within a Hundred or Lesser Precinct, as a Town, Manor, or the like; and therefore he hath the same Authority there, as the Sheriff hath in his Turn: For he hath ^a Jurisdiction in Offences which are common Grievances, and all ^b but Peers of the Realm, are bound to do Suit to it, and shall be there sworn to bear Allegiance to the King. The ^d Offender for an Amercement, shall be distrained throughout the whole Precinct of the Leet, as well out of the Land holden of the Lord of the Leet, as within it. And this is a Court of Record, the Court being the King's, and the Profit only the Grantee's. And it is to be kept before his Steward.

The ^e Turn of the Sheriff, as an Overseer of this Court, is to enquire if the *Decennaries* are full, or not, to ^f present Defaults not redressed in the Leet. And if, for Misuser, or other Cause, the Leet be seized into the King's Hands, all the Commons shall come to the Sheriff's Turn: ^g But otherwise, the Sheriff in his Turn, hath not Power to enquire of an Offence done within the Leet.

^h This Court is the King's Court; but the Profit of it goes to him that hath the Franchise.

Statutes.

Magna Charta, cap. 35. *It shall be holden once every Year, at Michaelmas.*

18 Ed. 2. For the View of Frank-Pledge. See there the Oath of the Jurors, and of what Things they shall enquire.

The Court of *Piepowders*ⁱ, which is incident to all Fairs and Markets (but by Custom a Court of Piepowders^k, may be without a Fair or Market) and is for all Actions arising there, by Reason of any Con-

† 4 Inst. 261. 2 Inst. 71. ^a 22 Ed. 4. 22. ^b F. N. B. 161. Bro. Leet. 39. ^d 2 H. 4. 24. 8 R. 2. Fitz. Avowry, 194. ^e 31 H. 6. Fitz. Leet. 11. ^f 12 H. 7. 18. ^g 29 Ed. 3. 21. Fitz. Avowry, 247. ^h 22 Ed. 4. 22. ⁱ Preamble of 17 Ed. 4. cap. 2. ^k 13 Ed. 4. 8. b. 4 Inst. 272.

tract,

tract, Covenant, Trespass, Debt, &c. And this also is
¹ Court of Record.

The ^m Steward is the Judge, and the ⁿ Suit ought
 to be commenced at the same Market or Fair.

Statutes.

Vide Statute 17 Ed. 4. cap. 2. made Perpetual, [b]
¹ Rich. 3. cap. 6. *No Plea shall be holden in Courts
 of Piepowder, except the Plaintiff or Attorney be sworn,
 that the Cause of the Suit was given the same Fair, and
 within the Jurisdiction. But such Oath shall not be con-
 clusive, but that he may plead as before.*

The Proceeding^o in this Court is *de hora in horam*.

And the Trial is by a Jury of Merchants there.

Vide Stat. 17 Ed. 4. cap. 2.

The other is a *Hundred Court*, derived out of the
 County Court: When a Man hath by Grant of the
 the King, a Court Baron for all the Inhabitants of the
 Hundred, to be holden before him or his Bailiff; and
 therefore it is in all Respects as a Court Baron. And
 all that, which hath been said of Court-Barons, except
 that which concerns the Writ of Right, serves for the
 Hundred Court also^p.

C H A P. XXVII.

Of Arbitrement and Accord.

HITHERTO have we spoken of *Suits*, which
 are the general Remedy of Things done other-
 wise than the Law directs. In special Cases^q, *viz.* where
 Chattels Real or Personal are to be recovered, the
 Remedy may be by Arbitrement or Accord, which is
 also called Concord: As in Trespass, Ravishment of
 Ward, &c. where only Damages are to be recovered.
 So in *Ejectione Firme*, *Quare Ejecit infra Terminum*,

¹ 6 Ed. 4. 3. b. Keilwey, 99. a. 6 Co. 20. a. ^m 6 Ed. 4. 3. b.
ⁿ Dyer, 133. pl. 80. ¹ Rol. Abr. 544. I. pl. 2. ^o 4 Inst. 272.
^p 2 Inst. 71. ⁴ Inst. 267. ¹² H. 7. 17. ¹³ H. 7. 19. That a Court
 Baron is Incident to every Hundred. ^q See for all thi, 9
 Co. 78. b. 6 Co. 44. a. ² Brownl. 131.

Waste in the 'Tenet, Detinue, as well of Charters which concern the Freehold or Inheritance, as of a Horse, or other Personal Goods, that is to say, altho' in these Cases, the Thing which shall be recovered, is a Chattel Real, and also a Thing, in certain, yet Accord is a good Plea in Bar. So in a Writ of Covenant for Repairs, for altho' the Action is founded upon a Deed, yet it is mixed with a Tort, for which Damages shall be recovered. ' But a Right or Title of Freehold doth not lie in Arbitrement, and shall not be barred by any Accord with Satisfaction, altho' the Satisfaction be of as high a Nature, as the Right in the Freehold.

[133] Arbitrement, is when the Satisfaction is by the Award of Friends, whom they choose to adjudge the Matter between them. For an ' Arbitrement, which does not import any Satisfaction at all for the Wrong put in Compromise, is not good: As that ' the one Party shall deliver back to the other his own Goods, is no Satisfaction: Otherwise it is to ' carry them to such a Place at his own Cost, or to do other Thing which is a Benefit to him; for if it be a Satisfaction, ' how trifling soever be that which he does, it is good enough, as if it be but to give one a Quart of Wine, or any such small Recompence. And therefore such Award is as a ' Judgment, so that the Controversy passes in *rem judicatam*, the ' Trespass is extinct and changed into a Duty, for which Action of Debt lies thereupon, and the Award alters the Property of the Chattels, that they may have ' Detinue for them, or ' Debt if any Sum of Money be awarded to be paid for a Debt due, or for amends of a Trespass. And herein

' Quære Vid. 6 Co. 44. a. Doc. Pla. 17. 2 Inst. 307.
 ' 1 Rol. Abr. 242. pl. 1. 4 Co. 1. b. 9 Co. 79. b. Co. Litt. 36. b. Doc. Pla. 17. 2 Brownl. 130. 1 Rol. Rep. 297.
 ' 43 Ed. 3. 28. b. Finchden. b 2 H. 5. 2. b. Plowd. 5.
 9 Ed. 4. 19. Dyer, 356. a. 1 Rol. Abr. 128. pl. 7. 12 H. 7. 15. Bro. Arbitrem. 32. Cro. Eliz. 194. ' 12 H. 7. 15.
 Ibid. ' 13 H. 4. 12. 43 Ed. 3. 33. 1 Rol. Abr. 128. pl. 9. 266. pl. 6. ' 8 Ed. 4. 1. b. ' 6 H. 7. 11. b.
 ' Dyer, 183. a. ' 16 Ed. 4. 9. F. N. B. 121. g. Plowd. 6.

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 H. 7. 11.

doth Arbitrement differ from Accord ; but an ¹ Award of an Acre of Land, or the like, is not good, except the Acre be delivered.

Accord, is when the Satisfaction is by Agreement between the Parties themselves^k, not by Mediation of Friends, for then it is an Arbitrement. And here there ought to be a Satisfaction ; ¹ as if he at his own Costs make an Agreement between I. S. and another, to whom I. S. had done a Trespass, this may be a Satisfaction to I. S. ; otherwise it is, if he only ^m endeavour to agree them. Also this Satisfaction ought to be ⁿ executed ; for a Tender ^o of Money without Payment, or an Agreement to pay Money ^p at a certain Day to come, is no Satisfaction before the Day is come and the Money is paid, and this shall not be pleaded in Bar in an Action of Trespass, because upon an Accord, the Party hath no means to make him to pay it, as he hath upon Arbitrement ; but if the ^r Money be paid at the Day, and before the Action brought, it is a good Plea.

ⁱ 19 H. 6. 38. Bro. Arbitrem. 21. Fitz. 6. 1 Rol. Abr. 266. pl. 3. Plowd. 11. ^k 30 H. 6. 4. Fitz. Accord. 5. ^l 15 H. 6. Fitz. Accord. 1. ^m Ibid. Plowd. 5. 1 Rol. Abr. 128. pl. 2. 3. ⁿ 6 H. 7. 11. b. *Curia* Fitz. Accord. 4. Bro. 3. and Trespass, 279. Plowd. 5. 1 Rol. Abr. 129. pl. 11. Dyer, 75. pl. 26, 356. a. ^o 1 Rol. Abr. 129. pl. 15. 17 Ed. 4. 8. 16 Ed. 4. 8. b. Cro. Eliz. 193. p. 6. 9 Co. 79. b. T. Jones, 6. ^p 6 H. 7. 11. b. 16 Ed. 4. 9. 17 Ed. 4. 3. 1 Rol. Abr. 129. pl. 12. Dyer, 75. pl. 26. 356. pl. 39. Plowd. 5. Note, that at this Day the Law seems to be taken otherwise in favour of executory Accords ; for of late it has been held, that upon mutual Promises an Action lies, and consequently there being equal Remedy on both Sides, an Accord may be pleaded without Execution, as well as an Arbitrement, and for the same Reason, that an Arbitrement is a good Plea without Performance. T. Raym. 450. urged by the Counsel, and agreed *per Curiam*. T. Jones, 158. And the Reason why Accord executory is now allowed to be pleaded in Bar against the former Opinions, is because a Remedy is now given for mutual Promises, which anciently was not, and therefore the Reason of the Law being changed, the Law is thereby changed. T. Raym. *supra*. Ld. Raym. 248, 965. Comb. 441. *Per Holt, C. J.* ^r 6 H. 7. 11. b. 1 Rol. Abr. 129. pl. 14.

[b]

The FOURTH BOOK.

CHAP. I.

Of the Court of the Constable and Marshal.

HITHERTO we have treated of the Common Law itself, within it's own proper Bounds. Now, to the Common Law this Excellency belongs, that it fixes the Bounds of all other Laws which we use, that is to say, of the Laws ^a Civil in the Courts of the Constable and the Admiralty, and of the Spiritual or Ecclesiastical Law. For all these do stand by the Common Law, which directs in what Cases, and in what manner they shall proceed; so that a ^b Prohibition lies to them, if they hold Plea whey they ought not: And ^c the Courts of the Common Law, take Notice of the Law of the Constable and Marshal, and also of the Law Ecclesiastical; and therefore ^d the Common Pleas, and other of the King's Courts, shall write to all these Courts; that is to say, to the Constable of England, to the Judges of the Admiralty, and to the [134] Bishop for Things there, whereof the King's Courts will be certified, altho' they themselves cannot hold Plea thereof.

The Court of the Constable is for Matters of War. See here the *Statute* 13 Rich. 2. cap. 2. And if an Alien Enemy comes into the Realm, and levies War here against the King, he shall be tried by this Court, not by the Common Law^e.

Statutes.

13 Rich. 2. cap. 2. *To the Constable belongeth to have Consuance touching Deeds of Arms, and of War out*

^a 37 H. 6. 21. for the Court of the Constable. 8 Co. 47. b. for the Admiralty. ^b 31 H. 8. Bro. Prohibition, 17. for the Admiralty. See 13 Rich. 2. cap. 2. for the Court of the Constable. ^c 37 H. 6. 21. ^d 30 H. 6. 6. Bro. Judges Just. 30. ^e 7 Co. 6. b. in Calvin's Case. 3 Inst. 5. 11.

of

of the Realm, and also of Things which touch Arms or War within the Realm, which may not be determined, nor discussed by the Common Law.

1 H. 4. cap. 14. *Appeals of Things done within the Realm, shall be tried by the Laws of the Realm, and such as are done out of the Realm, shall be tried before the Constable and Marshal of England.*

An Issue at the Common Law that he was ^f with the King, or ^g otherwise in War beyond the Sea (as upon an Obligation to go with the King in War beyond the Sea, or upon a Retainer to serve the King in War beyond the Sea, or upon a Distress for Escuage, or the like) shall be tried by the Certificate of the Constable and Marshal of the King's Host; which Certificate is not traversable^h, because it is a Trial in our Law.

C H A P. II.

[b]

Of the Court of the Admiralty.

THE Court of the Admiraltyⁱ, is for Things done upon the High Sea, and not within the Body of any County; for then all ^k there done is *Coram non Judice*, and a ^l Prohibition lies.

Statutes.

Vide 13 Rich. 2. cap. 5. *The Admiral shall not intermeddle but only of Things done upon the Sea, as it hath been used.*

15 Rich. 2. cap. 3. Stat. 1. *The Admiral hath not Jurisdiction of Contracts or Wrongs arising within the Body of a County, nor of Wreck; but of a Maibem done in great Ships, hovering in the main Stream of great Rivers, beneath the * Points of the same Rivers, near the Sea, and in no other Places of the same Rivers.*

^f 21 Ed. 3. 43. ^g 21 Ed. 4. 20. ^h 7 Co. 14. b. Doc. Pla. 352. 370. ⁱ 4 Inst. 139. 140. Hob. 79. ^k Plowd. 37. ^l 31 H. 8. Bro. Prohibition, 17. * Vjd. Owen 122. But Quære, if the Word *Portis* is not more reconcilable to the Construction of the Statute, as it is read in the old Abridgment, and Cay's Abr.

8 Eliz. cap. 5. Every Sentence definitive, which in any Civil and Marine Cause, upon an Appeal in Chancery, shall be given by the Delegates, shall be final.

CHAP. III.

Of the Spiritual Law. And therein of Men of Holy Church, and their Priviledges, and other Priviledges in Favour of Holy Church.

SUCH are the Courts of the Constable and Admiral, which use the *Civil Law*.

The *Spiritual Law* is allowed to Men of Holy Church in Causes, which are called *Ecclesiastical*; from whence it is named, the *Law of Holy Church*, or the *Canon Law*.

[135] By Reason hereof, there arise many Things, which are (as one may say) incorporated into our Law. For which Reason, first we will shew the *Spiritual Laws* themselves which they use, and which are approved in our Books, and then the Things that arise thereupon in our Law, as is aforesaid.

Spiritual Law.

The Men of Holy Church, (to omit the Pope and the Power he had abominably usurped, as the Head of the Church, and the Vicar of Christ, and to speak of the rest of the Clergy) do comprehend every one within Orders, whether Sacred^m Orders, as Priests, Deacons, Sub-deacons, or others. And all these are called Clerks.

What arises in our Law.

To Clerks, in regard to their Function, the Common Law allows certain Priviledges.

1. They are exempted from^a all personal Charges, which might hinder them in their Vocation; as^o to be elected into the Office of Bailiff, Beadle, Reeve,

^a The Preamble of the Stat. 23 H. 8. cap. 1. defines Sacred Orders to extend but to Subdeacons, and no further.

^o F. N. B. 227. f. 2 Inst. 4. Regist. 187. b. 2 Inst. 3. Co. Litt. 96. a.

or the like, for their Lands; whereof there is a Writ in the Register, "*That Clerks shall not be elected into the Office of Bailiff, &c.*" and this Writ recites, that by the Common Law, they ought not to be elected, and commands, that if any Distress or Amercement be levied in this respect, it be restored. So they are exempted from coming^p to the Sheriff's Turn, or the Leet; so the *Statute of Marlbridge, cap. 10.* recites, "*That Men of the Church, and other Men of Religion, are not compellable to come there;*" and this was by the Common Law.

2. In *Actions*, where the Process is Attachment, or Distress, if the Defendant be a Clerk who hath a Benefice, he ought to be warned by his Person, or Land, if he hath any Lay-Fee; otherwise, if the Sheriff return that he is a Clerk who hath a Benefice, but no Lay-Fee, Process shall issue to the Ordinary, to make him come by the Issues of his Benefice, which is called a *Venire Facias Clericum*^q.

In Favour also of *Holy Church*, the Law allows two other Privileges, *Clergy* and *Abjuration*.

Clergy is, that he who is in Sacred Orders (a Sub-deacon at least) as the *Statute 23 H. 8. cap. 1.* explains it (for such^r a Man, if he shew his Orders, or the Ordinary certify that he is in Orders, shall have *Clergy*, whether he can read or not; otherwise, he ought to be able to read a Verse) or other Person whatever, who by Possibility may be a Priest, may have the *Benefit of Clergy* as^a oftentimes as he offends, which Benefit is this, that Judgment shall not be given against him when he prays his *Clergy* before, nor Execution when he prays his *Clergy* after Judgment, but that he shall be delivered to the Ordinary, by him to be kept in Prison, if he be found Guilty, by Verdict or his own^b Confession before the Coroner, or the Justices, of any Felony (except Petit Treason) wherein Life or Member is to be lost, whether it be upon Indictment [b]

^p Marl. cap. 10. so recites. Ante 125. b. ² Inst. 4. 121. F. N. B. 160. c. Britton 71. a. ^q 32 H. 6. 11. b. ² Inst. 4. ^r St. Pl. Cor. 133. a. ^a Preamble of Stat. 4 H. 7. 13. ² Inst. 637. ^b St. P. Cor. 138. d.

or Appeal; but not if he be found Guilty^c of killing a Man by Misfortune, or in his own Defence, nor for Petit Larceny; for in these latter Cases, he shall not have Judgment of Life or Member; nor in Case^d of High Treason, or Petit Treason. And such Clerk by the^e ancient Law might have his *Clergy* before he was indicted; but now, he^f shall not have it upon his Arraignment, except he pleads to the Felony, and be found Guilty, for otherwise, he shall lose his Goods by an *Inquest of Office*, to^g which he might not have any Challenge, as he may have at this Day; but yet he may wave this Benefit, and pray his *Clergy* after the *Inquest* charged, and before their coming back again; in which case, the Verdict shall notwithstanding afterwards be taken, and this is *in favorem Vitæ*, because if the Jury find him not Guilty, he shall be discharged.

And this *Possibility* (if there be not some other Cause to the contrary^h, as if the Offender be a Woman, or be blind, or maimed, or the like) shall be tried by the Judges. And thereforeⁱ if the Ordinary challenge him, where he doth not read as a Clerk, the Ordinary shall be fined, and the Party hanged; or if the Ordinary refuse him when he reads as a Clerk, the Ordinary shall be fined also, and the Party discharged, for the Court are Judges of his reading, and the Ordinary is there only to challenge him for his *Clergy*. For the Entry is, *Legit ut Clericus, ideo tradatur Ordinario*. And the same shall be tried by the Judges, by his Ability to read^k, altho' he cannot read without spelling. But if he cannot read but here a Word, and there another, and not three Words together, *Quære*, if it be sufficient?

If the Clergy be had before Judgment (in which Case he is called a *Clerk Convict*) he shall be tried before the

^c St. Pl. Cor. 124. e. 2 H. H. P. C. 325. 6. ^d 11 Co. 29. b. ^e 2 Inst. 150, 629, 634, 635, 636. ^f St. Pl. Cor. 130. b. ^g 2 Inst. 164. Vid. 2 H. H. P. C. 378. ^h 2 Inst. 164. ⁱ St. Pl. Cor. 123. d. 11 Co. 29. b. Hale's Pl. Cor. 229. ^j 9 Ed. 4. 28. Fitz. Corone, 32. Bro. Clergy, 7. Kely, 28. 7 H. 4. 41. b. 7 Ed. 4. 29. a. ^k 2 Inst. 164. Hob. 290. 2 H. H. P. C. 381. St. Pl. Cor. 132. a. ^l 9 Ed. 4. 28. Bro. Clergy, 7.

Ordinary by a Jury of Clerks, and if he thereupon purge himself, he shall go at large, to which purpose there is a Writ to command the Ordinary to admit him to his Purgation; if he cannot purge himself, but be found Guilty by the said Clerks, he shall only be degraded *.

But upon an ¹ Appeal of Robbery, or the like, no Purgation shall be admitted; the Reason seems, because then the Plaintiff in the Appeal should recover his Goods without Cause, when by the Purgation it appears, that the other was not Guilty of the Felony. [136]

A Clerk convicted shall not answer to any Offence done before ^m.

Prerogative.

A Clerk convicted shall forfeit his Chattels, and shall never have Restitution, altho' he makes Purgation ⁿ.

If the Clergy be had after Judgment (in which Case he is called a Clerk Attaint) he shall ^o remain in perpetual Imprisonment.

Statutes.

25 H. 8. cap. 3. made Perpetual, 32 H. 8. cap. 3. and revived 5 & 6 Ed. 6. cap. 10. *Where a Man is indicted and arraigned in one County for stealings Goods in another County, and is found Guilty, or stands Mute, &c. he shall lose the Benefit of his Clergy in like manner, as if he had been indicted in the County where the Robbery was committed.*

28 H. 8. cap. 1. made Perpetual, 32 H. 8. cap. 3. *Every one within Holy Orders shall be ordered for the Offences there mentioned, in the same manner as those who are not within Holy Orders.*

1 Ed. 6. cap. 12. *Where a Man is attainted or convicted of Murder, Poisoning of Malice prepense, of robbing any Person in or near the Highway, of stealing Horses, Geldings, or Mares, or any Goods out of a Church, or*

PREROGATIVE.

Notice shall be given to the King of the Time before that he makes Purgation. 1 Ed. 3. 17. Fitz. Coron. 152. Stamf. 138. b.

* St. Pl. Cor. 138. b.
St. Pl. Cor. 138. b.
Bro. Forfeiture, 113.

¹ 12 R. 2. Fitz. Corone, 109, 247.
^m St. Pl. Cor. 138.
^o St. Pl. Cor. 138. c.

ⁿ 5 Ed. 6.

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Chappel, or being indicted or appealed of any of these Offences, is found Guilty, or will not answer directly, or stands mute, he shall lose the Benefit of Clergy.

2 & 3 Ed. 6. cap. 33. Persons feloniously stealing but one Horse, Gelding, or Mare, shall not have the Benefit of Clergy.

5 & 6 Ed. 6. cap. 9. Where a Man robs any Person in any House, Booth, or Tent in a Fair or Market, the Owner, his Wife, Children, or Servant, being within the Precinct, awake or asleep, he shall not have his Clergy.

4 & 5 P. & M. cap. 4. Any Accessary attained or convicted of Petit Treason, Wilful Murder, Robbery in any House, or Highway, or near it, burning of any Dwelling House, or Barn wherein there is Grain, or that stands mute, or challenges peremptorily above 28, or will not answer directly, shall not have Clergy.

[b] 8 Eliz. cap. 4. He that takes * Goods feloniously of the Person of another privately, without his Knowledge, and is found Guilty, or will not directly answer, or stands mute, or challenges above 20 peremptorily, shall not have his Clergy.

18 Eliz. cap. 7. Where a Man is found Guilty of Rape, or Burglary, or is outlawed thereupon, or upon Arraignment confesses it, he shall not have Clergy.

39 Eliz. cap. 15. Where a Man is convicted for stealing in the Day any Goods of five Shillings Value, or above, in any Dwelling House, or any Part thereof, or in any Out-House belonging thereto, altho' no Person be there at the Time, he shall not have Clergy.

1 Jac. 1. cap. 8. * Where a Man is convicted of stabbing or thrusting any Person who hath not any Weapon drawn, or who hath not then first stricken him, shall not have Clergy, viz. if so be the Person die within six Months.

4 H. 7. cap. 13. He that hath once had the Benefit of Clergy, shall not have it again, if he is not in Orders.

32 H. 8. cap. 3. Persons within Holy Orders which may have Clergy, shall be burnt in the Hand, and be ordered in all Respects as Lay-Clerks.

He that hath his Clergy, shall not be committed to the

* But the Value ought to exceed 12 d. or it is only Petit Larceny, for which he shall not have Judgment of Life.

P. Continued in-

definitely by 3 Car. 1. cap. 4. and 16 Car. 1. cap. 4.

Ordinary, but shall go at large, except the Justices by their Discretion will imprison him. Which Imprisonment shall not be above a Year.

Also he shall be arraigned, adjudged, and executed for other Felonies, in like manner as if he had been committed to the Ordinary, and there had made his Purgation.

8 Eliz. cap. 4. *He that hath his Clergy for a lesser Offence, and made his Purgation, may be indicted or appealed of a former Offence, in which Clergy doth not lie.*

1 Ed. 6. cap. 12. *A Peer of the Rea'm (in an Offence for which a Man may have Clergy) shall be as a Clerk convicted, without burning in the Hand, altho' he cannot read.*

* The Benefit of Abjuration is, that, every one who flies to a Church or Church-Yard, and there confesses before the Coroner, when he comes, the Truth of any Felony (which is not Petit Treason) where Life or Member is to be lost, before that he is thereof attainted, upon Indictment or Appeal (as that he stole such a Thing in certain, or killed such a Man; but when he takes the Church at first, it is sufficient to say, that he took it for a Felony which he hath done, generally, and needs not to name it until the Coroner comes to him) then such Person may abjure, that is to say, take his Oath before the Coroner himself to depart the Realm for ever, at such Time and Place as is prefixed for him to do so, and that he will go the direct Way there, and will not tarry but one Flood and one Ebb, if he can have a convenient Passage, and until he can get a Passage, that he will go every Day into the Sea up to the Knees, to try if he can pass over, and if he cannot pass within forty Days, then to render himself to the Church, as a Felon, &c. And by this means he shall save himself. * But this doth not hold in Case of High Treason, or Petit Treason, for the Coroner cannot attain him thereof upon his Confession, because he is no Judge of such a Crime: Nor can he be his Judge, as Coroner, although he hath the

^a Vide St. Pl. Cor. 119. b. and Fleta, l. 1. c. 29. per totum, for this whole Learning. ^r Fleta says up to the Neck. ^s St. Pl. Cor. 116. g. 2 Inst. 629. 3 Inst. 216.

King's Commission to do it. And if the Offender, being in the Church, will voluntarily confess a Felony, to the intent that he may escape for Treason, yet if the Coroner hath Information that he is charged with a Treason, he ought not to suffer him to abjure: And this is for the Benefit of the King, inasmuch as he is to have a greater Benefit if he is attainted of Treason, than of Felony, for that he shall have an Escheat. Same Law of Petit-Treason, for the Coroner cannot record his Confession of this any more than he can of High-Treason: Nor can the Coroner, if he be informed that he hath committed Treason, suffer him to abjure for Felony; and this in respect of the Heinousness of the Offence, notwithstanding that the King is not to have a greater Benefit in Petit-Treason, than in Felony. * Also a Man may not abjure for Petit-Larceny, because he is not to have Judgment of Life for it.

Such Abjuration is an Attainder in itself, and is the strongest Attainder that can be, being by his own Confession. And it ^a is a Forfeiture of his Lands; whereupon there is a Writ of Escheat of Land for Felony, *pro qua abjuravit Regnum*. And therefore ^a a Man that is hanged upon Judgment against him, and comes to Life again, may not abjure (but Abjuration in this Case is an Escape) because no one may have two Judgments for one same Offence.

Note, The 1 Jac. cap. 25. repeals all the Statutes of Abjuration and Sanctuary made before 35 Elizabeth. And therefore I have not here put any of them.*

Prerogative.

The King may appoint any Place that he will to be a Safeguard for any Offender flying there, so that he shall not be molested nor enforced to answer, whether it be that he flies there for Treason, ^a Murder, Larceny, or other Crime for which he shall lose Life or Member. And this, inasmuch as it takes effect by the Grant of the King only (for it trenches so high in the Preroga-

* Bro. Coron. 182. ^a Plowd. 262. Regist. 164. b. ^a 3 Ed. 3. Fitz. Corone 335. * 21 Jac. 1. cap. 28. Acc. ^a 1 H. 7. 25. b. ^a St. Pl. Cor. 111. a. Battle-Abbey had.

tive of the King, that it may not be by ^b Prescription) and is Matter of Immunity to one who offends against the King and his Crown, is a ⁱ Temporal Matter which belongeth to the Temporal Coercion and Jurisdiction, and needs not any Consecration. But yet being consecrated by the unholy Ceremonies of the Pope, it was called a *Sanctuary*.

[b]

C H A P. IV.

Of Archbishops and Bishops, and other Spiritual Corporations.

Spiritual Law.

THE Church is divided into several Provinces, and every Province into several Dioceses, and the Diocese into particular Parishes.

From whence it comes, that the principal of the Clergy are the Bishop, and Parson (who is also named Rector) of a Church.

Bishop, as the Archbishop, and Bishop properly so called.

Archbishop, who is in every Province; who is also called Metropolitan.

Bishop, who is in every Diocese.

To these the Clergy within their Diocese owe Faith and Obedience, which is called Canonical Obedience.

What arises in our Law.

If a Clerk kill his Prelate, to whom he owes Faith and Obedience, this is Petit-Treason ^k.

Statute.

Vid. 25 Ed. 3. cap. 2. Of Treasons. So recites it.

Spiritual Law.

Every Bishop, whether Archbishop or other, hath under him an Archdeacon, for the better Discharge of his Cure.

[138]

What arises in our Law.

If any one holds a Church with Force, so that the Bishop or the Parson cannot do their Office there, this

^b 1 H. 7. 26.ⁱ 1 H. 7. 25. b.^k 19 H. 6. 47. b.

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King's Commission to do it. And if the Offender, being in the Church, will voluntarily confess a Felony, to the intent that he may escape for Treason, yet if the Coroner hath Information that he is charged with a Treason, he ought not to suffer him to abjure: And this is for the Benefit of the King, inasmuch as he is to have a greater Benefit if he is attainted of Treason, than of Felony, for that he shall have an Escheat. Same Law of Petit-Treason, for the Coroner cannot record his Confession of this any more than he can of High-Treason: Nor can the Coroner, if he be informed that he hath committed Treason, suffer him to abjure for Felony; and this in respect of the Heinousness of the Offence, notwithstanding that the King is not to have a greater Benefit in Petit-Treason, than in Felony. * Also a Man may not abjure for Petit-Larceny, because he is not to have Judgment of Life for it.

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^h 1 H. 7. 26.

ⁱ 1 H. 7. 25. b.

^k 19 H. 6. 47. b.

Bac. Caf. of Petit-Treason.

shall

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shall be removed by the King's Writ, which is called *Vi laica removenda*; and lies especially where the Debate is between two Parsons of a Church, or Prebendaries, upon the Title, and the one holds the other out with Force and Arms. But by this Writ the Force only shall be removed, and not the Incumbent who is in possession of the Church, whether he be in possession by Right or by Wrong, for then he shall have a Writ to restore him again¹.

And this Writ shall be granted as well upon the bare Surmise of the Incumbent, or Party grieved, without any Certificate made by the Bishop in the Chancery, as upon such Certificate, and by reason of such Certificate. And there are two several Forms of the Writ in these two Cases; and this Writ is returnable and not returnable at the Pleasure of the Party who sues the same, and may be returnable as well into the Common Pleas, as into the King's Bench^m.

Spiritual Law.

All that have been named, viz. the Bishop, Archdeacon, Parson, are Spiritual Corporations.

What arises in our Law.

They are also Corporations at the Common Law: For aⁿ Parson (and the same is to be intended of the others) hath two Capacities; the one, to take to him and his Heirs, and the other, to him and his Successors, and in this latter Capacity he is seized in the Right of his Church; and^o if J. S. be Parson of Dale, and Land is given to J. S. Parson and his Successors, and J. S. Clerk and his Heirs, he is Tenant in common with himself.

Spiritual Law.

But besides these there have been divers other Spiritual Corporations made^p, Regular, and Secular.

Regular^q, who have entred into Religion (from whence they are called Religious) and have professed three Things, Obedience, Poverty, and perpetual Chas-

¹ Old N. B. 33. b. ^m F. N. B. 54. d. ² Inst. 54. ⁿ 40
Ed. 3. 27. Bro. Deane, &c. 2. 14 H. 8. 30. b. ^o 14 H. 8.
30. b. 4 H. 4. cap. 2. 4 H. 4. cap. 12. 2 Co. 48. b.
^q 2 Co. ibid. Co. Litt. 93. b. 94. 250. a.

tity; as an Abbot and his Convent, a Prior and Convent, and the like: And^a these are dead Persons in Law; and were^b made by the Pope. [b]

What arises in our Law.

The King hath made an Abbot, &c. the Head of Religious Corporations, able to purchase to the Use of the House^c.

Spiritual Law.

Secular^d, who have not so entered into Religion; as the Bishop and his Chapter, Master of a Hospital and his Brethren, Warden of a Chapel and his Chaplains, and the like.

The Chapter of the Bishop consists of the Dean as the Chief, and of the Prebendaries, or the like, who are most commonly called the Chapter^e.

What arises in our Law.

The King makes the Corporations of Dean and Chapter, and the like^f.

As to the Bishop and Chapter, which are but one Body, their Possessions are divided, so that the Bishop hath Part for himself, and the Chapter hath the Residue^g.

And their Possessions also for the most part are divided, the Dean having some Part alone in Right of the Deanery, and the particular Prebendaries some Part in Right of their Prebends; the Residue the Dean and Chapter have together. And each of them is to such Purpose incorporated by himself^h.

Statute.

Vide Westminster 2. cap. 41. *If Land which is given by the King to Abbies, and such Religious Houses, be aliened, the King shall seize the same; and if a common Person be the Founder, he shall have a Contra formam Collationis. And if Land given for a Chantry, Alms, or the like, be withdrawn for two Years, the Giver shall have a Cessavit.*

^a Littlet. 6. 200. Co. Litt. 94. a. ^b 14 H. 8. 3. b. ^c Ibid.
^d Co. Litt. 94. a. 250. a. ^e 17 Ed. 3. 40. b. Parning. ^f 14
 H. 8. 3. b. ^g 40 Ed. 3. 23. F. N. B. 195. ^h 3 Co. 76. a.
ⁱ 17 Ed. 4. 76. 17 Aff. pl. 29. 18 Ed. 3. 36. E. N. B. 195.

Spiritual Law.

The Heads¹ of these Spiritual Corporations are sometimes elective, sometimes presentative, and perpetual, having a common Seal; sometimes donative and removeable.

[139] *What arises from the whole hereof in our Law.*

If a Bishop, Abbot, Prior, Dean, Prebendary, or Master of a Hospital, discontinue, (that is to say, when they alien the Land which they have in right of their Church, House, Abbey, or Priory, without License of their Convent, Chapter, or Brethren) the Successor shall have a Writ of Entry *sine Assensu capituli*^k.

Statutes.

See all the Statutes of Mortmain.

See Westminster 2. cap. 41. Upon Land given to any Religious House, or for Maintenance of a Chantry, aliened, if the King be Founder, he shall seize it, if a common Person, he shall have Contra formam Collationis.

Upon a Chantry withdrawn for two Years, he shall have a Cessavit of the Chantry, to recover the Term itself.

Marlbridge cap. 28. Upon an Intrusion in the Time of the Predecessor, who brought an Action, and died whilst it was depending, or freshly before their Death, where no Action is brought, the Successor shall have an Action. So upon an Intrusion in Time of Vacation; and they shall recover Damages, as in Assize of Novel Disseizin.

¹ Land may be given to Spiritual Corporations to hold in Frankalmoign; for if an Abbot Tenant in Frankalmoign aliens to a Secular Man, he shall do Fealty to the Lord, because a Secular Man cannot hold in Frankalmoign. And in this^m Case of Frankalmoign he holdeth of the Donor, and is within his Fee, for the King's Grantee of Estrays within his Fee shall have Estrays in Land which is holden of him in Frankalmoign; and he that holdeth in Frankalmoign shall have against his Lord a Writ of *Mesne*, or *Ne injuste vexes*: And if an Abbot be Tenant in Frankalmoign, and all the Monks die, the Lord shall have the Escheat.

¹ 21 Ed. 3. 35. ¹¹ H. 4. 68. Co. Litt. 250. a. ^k F. N. B. 194. i. Littlet. §. 593. ¹ Littlet. §. 139. ^m 7 Ed. 4. 10.

By this Tenure ^a he is bound to say Orisons, and these Orisons are the Services; but inasmuch as the Orisons are not put in certain, he shall neither do Fealty, nor is he subject to any Distress or *Cessavit*, if they are not done.

And this draws to it Warranty and Acquittal against all Men, and Warranty against him and his Heirs ^o.

Prerogative.

Of every Abbey, Priory, or such House of the King's Foundation, he shall have a Corody for his Vadelet; to which purpose a Writ *de Corrodio habendo* lies ^p. [b]

The King is the Founder of every Bishopric, and therefore ought to have of each of them a reasonable Pension for his Chaplain until the Bishop hath promoted him to a convenient Benefice; to which purpose a Writ *de annua Pensione* lies ^q.

And the King did formerly ^a give the Bishoprics, but afterwards he granted free Elections to the Dean and Chapter: But the Dean and Chapter ^b shall not chuse a Bishop, nor the Convent an Abbot or Prior, of the King's Foundation, without the License of the King. And there is a Writ in the *Register* to signify to the Ordinary the Royal Assent to the Election of an Abbot, &c. commanding him to execute that which belongs to him to do; and therefore it shall always be directed to the Ordinary himself.

The King shall have the Temporalties of the Bishopric, Abbey, or Priory, which is of his Foundation, during the Vacation ^{*}. And there is a Writ in the *Register De restitutione Temporalium*, to restore them to the Bishop and Prior elected and consecrated; which Writ shall be directed to the Escheator [†].

Statutes.

Vide Magna Charta, cap. 5. and Westminster 1. cap. 21. *That Waste shall not be done, when the Lands are in Custody in Vacation.*

^a Littlel. §. 135. 6. ^o 7 Ed. 2. Fitz. Garranty 79. ^p F. N. B. 230. a. ^q F. N. B. 230, 231. g. ^a Co. Litt. 134. a. 344. a. 3. Co. 75, 76. ^b F. N. B. 169, b. 170. b. ^{*} 2 Inst. 15. [†] F. N. B. 169. a.

The King may seize the Temporalties of ^c Bishops, Priors, &c. for Contempt, and the Temporalties of a ^d Prior alien in time of War.

Statute.

Vide 25 Ed. 3. pro Clero, Stat. 3. cap. 6. *The Justices shall receive a reasonable Fine upon the Contempt adjudged.*

CHAP. V.

[140]

Of CONVOCATIONS.

Spiritual Law.

THE Archbishop and his Bishops, and the Residue of the Clergy of his Province, assembled in Synod, have Power to make Constitutions in Spiritual Things, to bind them of Holy Church^e.

Prerogative.

They ought to be assembled by the Authority of the King, and to have his Royal Assent to their Constitutions^f.

Statute.

8 H. 6. cap. 1. *The Clergy called in Convocation by the King's Writ, and their Servants, shall enjoy the Privileges, going, tarrying, and returning, that the Peers and Commons of the Realm in Parliament enjoy.*

What arises in our Law.

Before a Man^g shall be adjudged a Heretic, he ought to be convicted thereof by a Provincial Synod (for our Law does not take notice what Thing is Heresy) and after Abjuration make a Relapse into that, or any other Heresy, and then be newly convicted by them, and damned. And therefore the Writ of *Heretico comburendo* (as all other Writs) shall be directed to the Sheriff, after the Party is committed by the Clergy to the Secular Arm. But by the *Statute 2 H. 4. cap. 15.* every Bishop in his Diocese may convict a Man of Heresy, and abjure him, and afterwards convict him

^c 21 Ed. 3. 3. Stat. 14. Ed. 3. pro Clero, cap. 3. ^d 16 Ed. 3. Fitz. Monfrans Faits 166. ^e 20 H. 6. 13. Newton. ^f 25 H. 2. cap. 19. 4 Inst. 322. ^g F. N. B. 269. 3 Inst. 39.

anew thereof, and condemn him, and warn the Sheriff or other Officer to take him and put him into the Fire. And this the Sheriff or other Officer ought to do by the Precept of the Bishop without any Writ to be directed to them by the King to do it; but this Statute is repealed by the Statute of 25 H. 8. cap. 14. so that now the Ordinary ought not to commit him to the Lay-power to be burnt, without the King's Writ first purchased*.

CHAP. VI.

Of the Spiritual Jurisdiction of the Ordinary. [b]

Spiritual Law.

THE Spiritual Jurisdiction of the Ordinary is wholly in the Bishop, that is to say, in the Archbishop throughout his Province, and in the Bishop within his particular Diocese; from whence they are named Ordinaries, Spiritual Judges.

Statute.

37 H. 8. cap. 17. * *Every Doctor of the Civil Law lawfully deputed may exercise all Ecclesiastical Jurisdiction, and the Censures.*

Prerogative.

The King is the Supreme Ordinary, that is, by the ancient Common Law of England, before the Statute 24 H. 8. cap. 12. For^b Resignation may be made to him; he may^c give a Church to hold in proper Use; he may not only^d exempt any Ecclesiastical Person from the Jurisdiction of the Ordinary, but moreover may grant to him Episcopal Jurisdiction; he shall

* By the Stat. 29 Car. 2. c. 9. the Writ *de Hæretico comburendo* is abolished, with all Process thereupon, and all Punishment by Death in pursuance of Ecclesiastical Censures. But this doth not abridge the Jurisdiction of Protestant Archbishops or Bishops, or other Judges of Ecclesiastical Courts, but that they may punish Atheism, Blasphemy, Heresy, Schism, &c. according to the Ecclesiastical Laws, by Excommunication, Deprivation, Degradation, and other Ecclesiastical Censures, not extending to Death. *Laus Deo.* * Revived 1 Eliz. cap. 1. ^b Plowd. 498. ^c 7 Ed. 3. Fitz. Quar. Imped. 19. Vid. 29 Ed. 3. 9. ^d 1 H. 7. 23. 17 Ed. 3. 23.

* present to his free Chapels (in default of the Dean) by Lapse, and this as Ordinary, and in respect of his Supreme Ecclesiastical Jurisdiction: Also he may dispense^f with a Bastard to be a Priest, altho' it is prohibited by the Laws Ecclesiastical allowed here within this Realm; but the Reason is, because it is not *Malum in se*, but *Malum prohibitum*. And all that which the Pope used to do in such Cases within the Realm, that is, his Provisions,^h Appeals to the Court of Rome,ⁱ holding Plea of Things Spiritual arising here,^k Excommunication under his Bulls, and the like, were nothing but Usurpations and Encroachments upon the Dignity and Prerogative Royal.

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Spiritual Law.

Sometimes this ordinary Jurisdiction is delegated to other Spiritual Persons, as Archdeacons, or the like, in some particular Places; from whence they are called *Peculiar*s.

What arises in our Law.

Upon an Issue at Common Law of Matter of Fact, which is a Thing Spiritual, as Bastardy, Excommunication, or the like,¹ the Trial shall be by the Certificate of the Ordinary; and therefore his Certificate makes an end of the Matter, and is not traversable.

The Ordinary is also the immediate Officer to the King's Court, as to Things Spiritual, that is to say, to serve their Process; which shall be by the Ordinary himself, not by the Commissary, Archdeacon, or any other, altho' he hath immediate Jurisdiction, if he was not specially admitted an Officer of the Court^m.

* 27 Ed. 3. 84. F. N. B. 34. f. ^f 11 H. 7. 12. 5 Co. 28. a. Caudrey's Case. Hob. 147. ^g 19 Ed. 3. Fitz. Quare non admittit 7. See Stat. 25. Ed. 3. of Provisors. ^h Preamble of 24 H. 8. c. 12. ⁱ 9 Ed. 4. 3. F. N. B. 44. h. ^k 30 Aff. pl. 19. ¹ 7 Ed. 4. 14. 7 Co. 14. b. Doc. pla. 352. ^m 7 Ed. 4. 14. 8 H. 6. 3. 12 Ed. 4. 15.

C H A P. VII.

*Of Suits in Spiritual Courts.**Spiritual Law.*

THEⁿ Suit in their Courts is by Libel: The Proceeding by Citation and Censures of the Church, that is to say, ° Excommunication if the Party do not appear, or for other Contumacy, as in Disobedience of their Sentence, or the like.

Statute.

Articuli Cleri cap. 12. *The King's Tenants may be cited out of their Parish or Town.*

What arises in our Law.

The Suit of a Person excommunicated shall be put without Day, until he be absolved. The Entry is, “*Let the Plaint remain without Day, until, &c.*”

Prerogative.

If he that is excommunicated will not by 40 Days be reconciled to the Church, and justified by their Censure, the King, upon a *Significavit*, that is, a Certificate made to him in the Chancery by the Ordinary, shall put him into Prison, and so justify him by his Body, until will satisfy the Church for his Contumacy and Contempt; and this by a Writ *de Excommunicato capiendo*; which Writ is also a *Justicies*⁹.

Statutes.

Vide 5 Eliz. cap. 23. *The Manner of the Execution of this Writ.*

When the Church is satisfied, and they have absolved him, he shall have a Writ *de Excommunicato deliberando*, to deliver him out of Prison^r.

When one who is taken by the Writ *de Excommunicato capiendo* offers sufficient Surety or Caution to obey the Church, which is refused, he shall have a Writ^a *de*

[b]

ⁿ Vid. Stat. 2. H. 5. cap. 3. for Citation and Libel. ° Vid. Artic. Cleri, cap. 12. ^p 30 H. 6. 40. Littlet. §. ^q Old N. B. 34. 35. b. ^r Old N. B. 35. a. F. N. B. 63. a. ^a F. N. B. 63. c. See Bacon of Government 113. touching this Writ.

Cautione admittenda, to have this Caution admitted, and to be delivered. And it may be either to the Ordinary himself, to command him to be delivered, which the Ordinary may do by Word, or to the Sheriff, to make such Deliverance; and then it is with an *Excommunicato deliberando*.

Spiritual Law.

The Party grieved by the Sentence in the Spiritual Courts shall have an Appeal; and by this the Sentence is suspended, until the Appeal be discussed *.

What arises in our Law.

If the ^b Spiritual Court holds Plea where it ought not, as of Goods, or Chattles, or the like, and altho' ^c it be a Matter for which the Plaintiff hath not any Remedy by the Common Law, as of a Covenant broken without Specialty, or Debt against Executors upon a Simple Contract made by the Testator, or for *Lesione Fidei* against one who hath waged his Law in an Action of Debt upon a Simple Contract, and hath taken a false Oath, in such Case a Prohibition lies. But a Man who sues in the Spiritual Court in Cases belonging to their Jurisdiction, as for Matters Testamentary or Matrimonial, and is restrained by a Prohibition, shall have a Consultation to them to proceed ^d.

Statutes.

Vide 24 Ed. 1. Of Consultation. *After Prohibition, if the Chancellor, or Chief Justice of the King, see, upon the View of the Libel, that the Spiritual Court ought to determine it, they shall award a Consultation.*

[142] 50 Ed. 3. cap. 4. *The Judge of Holy Church may proceed by virtue of a Consultation once granted, notwithstanding another Prohibition afterwards, that is to say, if the Matter in the Libel be not engrossed, enlarged, or changed.*

Spiritual Law.

The Suits in the Spiritual Courts are of two Sorts, viz. in Offences, and in Matters of Interest.

The Suit in Matters of Offences, is not to recover Damage, or any other Thing, neither can the ^a Pre-

* 4 Inst. 340. ^b Old N. B. 30. ^c 22 Ed. 4. Fitz. Consultation 2. Ante 28. a. ^d Old N. B. 32. b. ^e Artic. Cleri, c. 2.

lates impose any pecuniary Mult, but it is only to inflict Punishment on the Offender, viz. Canonical Punishment ^b, *pro Salute Animæ*, which is called *Penance*. But the Party ^c may redeem it with a pecuniary Amends.

Prerogative.

All Suits there of this Nature (viz. to inflict Punishment on the Offender) not only *ex Officio*, but at the Prosecution of the Party grieved, are ^d for the King, inasmuch as only Punishment is to be inflicted, and no Damages to be recovered; and he may ^e pardon them.

* The Offences punishable in Court Christian, are either such as are punishable *ex Officio Judicis* only, or such as may be prosecuted by the ^f Party damnified.

Of the first Sort are Simony, Heresy, & Adultery, Fornication, ^h Usury, not receiving the Sacrament from his Curate, ⁱ letting the Church-yard lie uninclosed, or the Church uncovered, or not conveniently decked, *pro* ^k *lesione Fidei*, or the like.

A Parson ^l, or the like, in Offences herein of a greater Nature, as Heresy, &c. may be deprived.

In Offences which may be prosecuted by the Party damnified, he shall recover his Costs ^m, and shall sue for them in Court Christian. So also he may sue there, where ⁿ another agrees to pay him a certain Sum of Money in amends, to redeem his corporal Penance, and afterwards does not pay it.

The Offences of this Sort are,

1. The ^o laying of violent Hands upon a Clerk.
2. Defamation ^p of Adultery, Usury, or such Offence, whereof the Spiritual Law hath Cognizance.
3. The ^a taking and detaining the Wife of any Man; [b] that is to say, he may sue there for the Restitution of

^b 4 Co. 20. a. ^c Artic. Cleri, cap. 2, 3, 4. ^d 5 Co. 51. a.
^e Hob. 82. Dav. 73. a. ^f 5 Co. 51. b. ^f F. N. B. 53. a.
^g Stat. de Circumspecte agatis. ^h 2 Inst. 488. ^h Stat. 15 Ed. 3.
 cap. 5. [repealed]. Regist. 49. a. ⁱ 2 Inst. 489. Dr. & St.
 l. 2. c. 32. ^k 2 Inst. 493. ^l F. N. B. 53. b. ^m F. N. B.
 52. m. ⁿ F. N. B. 53. a. 12 H. 7. 22. ^o 4 Co. 20. b. ^o Ar-
 tic. Cleri, cap. 3. ^p 2 Inst. 492. F. N. B. 51. k. ^p F. N. B. 51. i.
^a F. N. B. 52. k.

his Wife, altho' he may have an Action of Trespass at the Common Law.

Such are the Suits in Court Christian, as to inflicting Punishment upon Offenders. Those follow which are for the *Interest* of the Party.

These are,

1. Of all Things which tend to the Maintenance of the Church; as

The Parson, Vicar, &c. shall sue there against † his Parishioners for subtracting of Tithes, or diturbing him from carrying his Tithes by the Ways and Passages used for that Purpose, for a ^b Mortuary, where it hath been accustomed, &c. for ^c Oblations, Obventions, &c. but if the ^d Parson, &c. sell them, being in his Barn, or elsewhere, there he shall not sue for the Money in the Spiritual Court; for by the Sale the Tithes are become Lay Chattels. And altho' a ^e Man erects a Mill in his Land *de novo*, yet he shall pay Tithes.

One Incumbent shall sue there against another Incumbent for Tithes, or other Fruits of the Church, or for the Church itself, when they claim by one same Patron, and in which the ^g Patronage, that is to say, the Right of Advowson of his Tithes, nor any Part thereof, doth not come in question. And this is called *Spoliation*; as a Parson who takes another Benefice, or is created a Bishop, and hath a Dispensation to retain his Parsonage, shall have *Spoliation* in Court Christian against another Incumbent presented by the Patron. And then it shall come in Debate whether he hath a Plurality, or a Dispensation, or not. But note, that now by the *Statute Westminster 2. cap. 5.* he may sue in Court Christian for Tithes, altho' they claim by several Patrons, so that the Right of the Advowson of the Tithes comes not in question, that is to say, if he do not demand the fourth Part of the Value of the Church ^h.

† Stat. de Circumspecte agatis.

2 Inst. 490.

^b 2 Inst. 491.

^e Artic. Cleri, cap. 1.

^d Ibid.

^c Ibid. cap. 5. Post. 147. a.

^f Stat. de Circumspecte agatis.

^g F. N. B. 36. g. 51. c. For

where the Title of the Patronage is in question, there is no Spoliation. ^h F. N. B. 51. c. 2 Inst. 491. Post. 146. a.

Statute.

Statute.

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18 Ed. 3. pro Clero, cap. 7. ^a *Writs of Scire Facias to Clerks, to answer touching Tithes in the Chancery, shall not be granted for the future.*

Also he shall sue there ^b against another Parson or Vicar, for a Pension due to him. And the Executors of his Predecessor for the Dilapidations of his Predecessor. See the *Statutes* 13 *Eliz. cap. 10.* and 14 *Eliz. cap. 11.*

Church-Wardens ^c shall sue there for Goods devised to the Repairs of the Church, or of the Church-yard, or the like.

The Parishioners and the Parson ^d shall sue there the Tenants or Possessors of any Land within the Parish, who were used time out of mind to find a Chaplain for Divine Service in the Parish Church, and now retract, and will not find such Chaplain.

2. In Causes matrimonial and testamentary ^e.

Statutes.

Vide 13 Ed. 1. Stat. Circumspecte agatis.

Artic. Cleri, cap. 1, 2, 3, 4, 5, 6, 13. Vid. cap. 7.

Prohibic. super Artic. Cleri. Rast. Prohib. 5.

1 Rich. 2. cap. 14.

See all these Statutes for the Spiritual Jurisdiction.

In Causes matrimonial, are the Contract itself of Matrimony, and the Right of Marriage, Promise to marry my Daughter, &c. And for the same Reason Divorces, Matter of Bastardy, and the like ^f.

Statutes.

2 Ed. 6. cap. 23. *The Authority of the Judge, in Ecclesiastical Causes, confirmed.*

32 H. 8. cap. 38. *All Marriages are declared lawful, which are not prohibited by God's Law.*

5 & 6 Ed. 6. cap. 12. revived 1 Jac. 1. cap. 25. *The Marriage of Priests and other Ecclesiastical Persons shall be adjudged lawful, their Children inheritable, they them-*

^a Before this Stat. the Right of Tithes was determinable in the Temporal Courts at the Election of the Party; and now they shall be determined in the Ecclesiastical Courts, and the Temporal Courts are excluded.

^b 2 Inst. 491.

^c Regist. 57.

^d F. N. B.

53. l.

^e 2 Inst. 488.

^f Vide 15 Ed. 3. cap. 6.

[b] *selves enabled to be Tenants by the Curtesy, and their Wives dowerable.*

Where a Man marries a Woman by whom he had Issue before, such Issue is by the Spiritual Law a *Mulier*, that is to say, a legitimate Issue, and no Bastard; but in our Law such Issue is a Bastard, and not inheritable^e.

What arises in our Law.

If a Man^b hath a Bastard by a Woman, and afterwards marries the same Woman, and during the Espousals hath Issue by her, so that both the Issues shall be of the same Father and Mother, there if, after his Death, such Bastard (who is called *Bastard eigne*, and the other is called *Mulier puisne*) enters first into the Land descended from the Father (that is to say, before his Brother, or^a Sister, if both are Females) and^b continues the Possession all his Life without Interruption, this shall gain to him the Right of the Inheritance, altho' the^c *Mulier puisne* be an Infant, because this binds the Right. And the Reason of this Maxim is, ^d because such Bastard is a *Mulier* by the Law of Holy Church, and therefore hath Colour to enter as Heir to his Father.

Spiritual Law.

As to Causes testamentary, the committing of Administration, &c. it is to be known, ^e that it is but of late time that the Church hath had the Probate of Testaments in this Land; for the Temporal Courts have the Probate of Testaments in all other Places except *England*: And in many Places in *England* the Lords of Manors have the Probate at this Day in their Temporal Courts. And anciently^f Bishops had no Power to commit Administration, but when a Man died intestate, the King, as *Pater Patriæ*, was wont, by his Ministers, to seize the Goods, to the intent that they should, be preserved and disposed for the Burial of the Dead, the Payment of his Debts, the Advancement of his Wife,

^e Vid, Statute of Merton, cap. 9. Littlet. §. 400. Ante 28^a b. 1 Rol. Abr. 357. ^b Littlet. §. 399. ^a 17 Ed. 3. 59. F. Bastardy 32. ^c 2 Ed. 3. 16. ^d 36 Aff. pl. 2. Bro. Discent. 29. ^e Littlet. §. 400. ^f 2 R. 3. Fuz. Testament 4. 11 H. 7. 12. b. Bro. Testam. 26. 9 Co. 37. b. 5 Co. 16. a. b. Caudey's Case. Perk. Sect. 486. Vaugh. 207. 1 Sid. 46. Selden's Jurisdiction of Testaments, 9, 10. ^g 9 Co. 38. b. 2 Inst. 488. 2 Rol. Abr. 217. Carter 129, 131.

and his Children if there were any, if not, the next of his Blood.

But notwithstanding this, in regard of the long Usage of these things in the Spiritual Court as Spiritual Matters, I have put them under the title of Spiritual Laws.

In Causes testamentary are these following,

1. The ^a Testament ought to be proved before them in their Courts; and the Executor ^b sworn to perform it.

What arises in our Law.

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If many Executors be made, and one refuses, yet he may administer ^a at his Pleasure, and the other shall name ^{*} him in every Action for any Duty due to the Testator, and his Release shall be a Bar of the whole Duty [†]: And if he survive the other Executor, he shall have the Action, ^{||} and not the Executor of him who died; otherwise it is ^b if all refuse; for then the Testator dies intestate: But if the Executor ^c once administer, as if he sell Land in Use which is appointed by the Will to be sold, and the Money to be disposed, &c. he shall never refuse afterwards.

Statute.

21 H. 8. cap. 4. *Where a Man devises that his Executors shall sell his Land, and one refuses, the other may sell it alone.*

^f When Executors bring any Action, it shall be in all their Names, that is, as well of those that refuse, as others. ^g But an Action may be against him who administers alone.

^g 21 Ed. 4. 24. ^h Plowd. 544. ^a 21 Ed. 4. 24. Bro. Executors 117. Dy. 160. pl. 42. Hard. 111. 9 Co. 37. a. 1 Anderf. 27. Moor 273. 2 Brownl. 58. Bac. Use of the Law, *versus finem*. Noy's Max. 102. for notwithstanding his Refusal, he is privy to the Last Will, and remains Executor still, so that a Sale may not be made to him. Co. Litt. 113. a. 1 Anderf. 27. ^{*} M. 2. A. 3. 20 & 22. Bro. Executors 168. Perk. § 485. Plowd. 184. 35 H. 6. 36. Fitz. Executors 26. 9 H. 5. 6. Ibid. 48. Theolal. 58. 9 Co. 37. a. 1 Rol. Rep. 176. Noy's Max. 102. Salk. 307. [†] 21 Ed. 4. 24. Bro. Executors 117. 5 Co. 28. a. 9 Co. 37. a. Noy's Max. 102. ^{||} 21 Ed. 4. 24. *ubi supra*. 9 Co. 37. a. Salk. 307. *Sed* Dyer 160. pl. 42. is contrary. ^b 36 H. 6. 8. a. 20 H. 6. 1. b. 19 Ed. 3. F. Covenant 24. 50 Ed. 3. 9. 9 Co. 37. a. 1 Rol. Abr. 907. Ante 45. b. Dy. 236. pl. 27. ^c 9 Ed. 4. 47. b. Bro. Executors 90. 9 Co. 37. a. Bac. Elem. 161. ^f 21 Ed. 4. 23. 19 H. 7. 4. b. ^g 32 H. 6. 25.

Spiritual

Spiritual Law.

2. For Legacies given in a Will, the Legatees shall sue there.

3. Where a Man dies intestate, ^h the Ordinary shall have the Disposition of all his Chattels to pious Uses; for he that had the Care of his Soul in his Life is presumed to be the fittest Person to have the Care and Disposal of his Goods to pious Uses after his Death. And therefore the Ordinary may seize the Goods, and keep them without Waste, and may alien or sell them at his Will, and dispose of the Money that he hath for them to pious Uses; and if he doth not do so, he breaketh the Trust and Confidence which the Law reposes in him; but yet his Gift or Alienation remains good in Law. But he being a Spiritual Governor shall not be subject to Temporal Suits, nor shall he have Action of Debt, or any other Action, for any thing due by or to the Intestate.

Statutes.

Westminster 2. cap. 19. *Where the Intestate is bound in any Debt, the Ordinary shall answer as far as he hath Assets, in like manner as the Executor should do.*

Vide 31 Ed. 3. cap. 11. *The Ordinary shall depute the next Friends of the Intestate to administer; and they shall sue, and shall be sued, and shall be accountable to the Ordinary as Executors.*

[b] Vide 21 H. 8. cap. 5. *The Ordinary shall commit Administration to the Widow of the Intestate, or next of kin, or both, by his Discretion. Where they are in equal Degree, the Ordinary shall commit it to which of them he pleases, who make Request.*

C H A P. VIII.

*Of PRESENTATIONS.**Spiritual Law.*

Hitherto of the Bishop. It follows to speak of the Parson of a Parish. He who is to be Parson of a

^h Plowd. 277. 9 Co. 39. a. This was at the Common Law.
Note. Eac. of the Use of the Law, *ve. sus finem.*

Church,

Church, shall first be made a Clerk, and shall be presented by the Patron to the Ordinary who hath the Admission, that is, the ^a Allowance of him; and who is therefore ^b allowed Time to inquire of the Hability of the Clerk; as if he be presented to the Bishop, when he is going upon a Journey, if he command him to come within three Days afterwards to be examined, and he doth not come at the Day, nor within Six Months, or such Time afterwards, the Bishop may collate by Lapse, for there are many things to disable him that he shall not have the Benefice, as if he be a Person of a criminal Character, insufficient, a Villain, hath not the Letters of his Order, &c. And if a meer Layman be presented, admitted, and instituted, and no Sentence of Deprivation or Nullity given, the Ordinary cannot collate by Lapse^c; for the Church is full to all intents, when the Ordinary admits him to be able. And this is called *Admission*. And when he admits him to the Charge, as to say to the Clerk, *Instituo te habere curam Animarum**, this is *Institution*. And the Admission is also called Institution; and by this

^d the Church becomes full; so that^e at the Common Law in a *Quare impedit*, Plenarty the Day of the Writ purchased is a good Plea, ^f altho' it be by Institution only, and the Plenarty by Six Months (which bars the right Patron of his *Quare impedit* by the *Statute Westm. 2. cap. 5.*) is accounted from that Time between common Persons. So it is for the King, when he presents. And in these Cases the ^a Ordinary may certify a Plenarty without making mention of the Induction, but of the Admission and Institution only. But against the King Plenarty is accounted from the Time of the Induction, and not before. And if the Patron ^b who holdeth of the King, present and die after Admission and Institution of his Clerk, and before Induction, and

PREROGATIVE.

Against the King it is not full until Induction. Bro. Presentment 46. Co. Litt. 119. b. 344. 2 Inst. 358. Dy. 217. pl. 62. 6 Co. 49. b.

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^a Artic. Cleri, cap. 13. ^b Hob. 317. 14 H. 7. 21. b. ^c Dyer 292. b. Hob. 148, 149. 5 Co. 102. a. * Co. Litt. 344. a. ^d Co. Litt. 119. b. 2 Inst. 358. 4 Co. 79. b. ^e Plowd. 501. ^f Bro. Presentm. 46. ^a Dy. 217. pl. 62. ^b 21 Ed. 4. 34. b. 38 Ed. 3. 9. Plowd. 528. Hob. 339.

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the Land comes into the King's Hands, the King shall present another. Otherwise in the Case of a Common Person. But Plenarty is no Plea^c in a *Quare impedit* against a Parson imparsonnee (that is, a Spiritual Body Politic, which being Patrons have the Church appropriate in Succession, viz. to hold to their own proper Use without Presentation, Institution, or Induction of any Incumbent) for his Plea ought to be, that the Church is full of his own Presentation, which a Parson imparsonnee may not say.

Statutes.

Westminster 2. cap. 5. *Vide infra that it shall be no Plenarty, until the Six Months incur.*

Articuli Cleri, cap. 13. *Of the Ability of a Parson presented to a Benefice, the Examination belongeth to the Ecclesiastical Judge.*

What arises in our Law.

Upon Admission, the Archdeacon is to put him in Possession, by Delivery of the Ring of the Church-door or by tolling of a Bell; which is called *Induction*; and by this the Person is called an *Incumbent*: Before which Induction there is not any Possession or Freehold of the Glebe in him, or of the House, or of the Tithes; so that a Rent granted by a Prebendary after Admission and Institution, and before Induction, with the Confirmation of the Ordinary before Induction, and of the Dean and Chapter the Day of the Induction, is void*.

*Spiritual Law.***PREROGATIVE.**

The King shall have his Presentation notwithstanding a Lapse; for nullum tempus occurrit Regi, 2 Inst. 273.

Statute.

Prerogativa Regis, cap. 9 Acc.

[b] Clerk, whom he will. And^a if it be void Six Months after his Time, then the Metropolitan, and, Six Months after him, the King. All this is to be intended^b if the

The Church^d being void by Six Months without any Presentation (which is called a Lapse) the Ordinary of himself may collate; that is, appoint a

^c Plowd. 501.

^a Plowd. 528.

^d 13 Ed. 4. 3. b.

This Title to present by Lapse was given to the Ordinary, by a Constitution in the Council of Lateran.

^a Dr. & St. lib. 2. cap. 36.

^b Ibid.

Patron do not present before them; but so long as the Church is void, altho' it be two Years after, the Patron may present, and the Ordinary or Metropolitan are bound to admit him. *Quere*, if so it be where^c the King is intitled to present by Lapse.

What arises in our Law out of the Spiritual Law, concerning Presentations.

It is to be known, that Patronage, or the Interest to present to a Church, is called an *Advowson**, which is a Lay-hereditament, and lies in Tenure; for a common Person may give an Advowson to hold of him; and the Writ of Right of Advowson is, "*Which he claims to hold of you*†."

When he who is not the rightful Patron presents to a Church, and by his Presentation the Church becomes full, this is called an *Usurpation*, and puts the right Patron out of Possession‡.

Statutes.

Vide Westminster 2. cap. 5. *infra*.

And here three Writs lie in Matter of Presentation, whereof two are in the Right, Writ of *Right of Advowson*, and *Quare impedit*.

The Writ of *Right of Advowson* is for the meer Right thereof: And this lies at the Common Law of an Advowson of Tithes of any Part, that is to say, of five Acres, or ten Acres, or one Acre, or the like, and altho' it be but to the^d Value of the twentieth or thirtieth Part of the Tithes. ^e For at the Common Law the Court Christian had not Power to hold Plea of the Advowson of any Part of Tithes, but a Prohibition lay which is called an *Indicavit*; and ^f it was always when the Suit was between two Clerks claiming from several Patrons: So that there were four Persons, *viz.* two Patrons, and two Clerks, the one claiming from one Patron, the other from the other Patron; for Advowson being a Lay-hereditament, in every Case where the Patronage shall come in question, the Common Law is to

^c Vid. 2 Inst. 273. Dr. & Stud. ib. Wood's Com. L. 168.

* Co. Litt. 119. b. † 15 H. 7. 8. ‡ Vid. Westm. 2. cap. 5.

^d 38 H. 6. 20. ^e F. N. B. 30. f. ^f 12 Ed. 4. 13. b.

decide it: But if the Patronage do not come in question, then they shall sue in the Spiritual Court by *Spoliation*, as is aforesaid. And this *Indicavit* lay at the Common Law, altho' the Right but of the twentieth or thirtieth Part of the Tithes was in demand: But by [146] *Westminster 2. cap. 5.* it shall not be had except of Tithes to the value of the fourth Part of the Church at least; and therefore there is now a Writ of Right of Advowson of Tithes of the fourth part, or third part. But such Writ was not at the Common Law².

Statutes.

34 Ed. 1. De conjunctim Feoffatis. *Indicavit* shall not be granted, until the Suit hanging in the Spiritual Court between the Parties be recorded, and the Chancellor be certified thereupon by sight of the Bill.

Vide *Westminster 2. cap. 5.* When by the Writ of *Indicavit* a Parson is disturbed to demand Tithes in a neighbouring Parish, his Patron shall have a Writ of the Advowson of the Tithes, and after the Plea is deraigned in the King's Court, it shall proceed in Court Christian.

Quare impedit, being mixed in the Right, lies upon a Disturbance, viz. where he, or his Ancestors, or those of whom he claims, have presented at any time, and he is now disturbed^h.

In a *Quare impedit*, or *Affize of Darrein Presentment*, no special Effoign, that is to say, of the King's Service, or the like, lies; for then the Six Months might pass, and the Church might come into Lapse, for such Effoigns have Adjournment of a Year and a Day; but a common Effoign lies¹.

Here the Grand Distress shall be in lieu of *Petit Cape*, as in a *Writ of Annuity, Quo Jure*, and the like^k.

The third Writ is Possessory, viz. *Affize of Darrein Presentment*, which lies upon a Disturbance, when he or his Ancestors have last presented to the Church; therefore it lies for Tenant for Years, as well as for him that hath an Estate of Inheritance, or for Life¹.

² Vid. F. N. B. 30 e. 10 Co. 136. b. Ante 142. b. ^h F. N. B. 33. h. 6 Co. 51. a. ¹ 27 H. 6. 1. Kelwey 135. b. ² Inst. 124, 125. ^k 2 H. 4. 1. b. ¹ F. N. B. 31. Old. N. B. 33. 5 H. 7. 16. b.

The Proceeding is as in Affize of Mortdancestor, that is to say, Summons, Resummons, and in other Points as there^m.

Statutes.

Westminster 2. cap. 5. *Any Usurpation upon a Guardian, Tenant for Life, for Years, or in Tail, Feme covert, or House of Religion in time of Vacation, shall not put the Heir, the Feme, or the House, out of Possession.*

Plenary is no Plea in a Quare impedit, or Affize of Darrein Presentment, if the Writ be purchased within Six Months.

Upon Partition inrolled before the Justices, or by Fine between Parceners to present by turn, and executed, if they are disturbed in their Turn, they shall have a Scire Facias.

Where Tenant in Dower, or by Curtesy, have presented, the Heir being disturbed shall have a Quare impedit or Darrein Presentment, that is to say, if his Ancestor have presented: So of Advowsons, Leases for Life or Years, or in Tail. [b]

See there, In a Quare impedit, and Darrein Presentment, if Six Months pass pending the same, so that the Bishop present by Lapse, Damages to the value of Two Years of the Church shall be recovered; otherwise to the value of half a Year.

Writs shall be granted of Chapels, Prebends, Vicarages, Hospitals, &c.

The Presentment of one Parcener in the Turn of another, shall not gain Possession.

Vide 25. Ed. 3. Stat. 3. pro Clero, cap. 7. The Ordinary or Possessor may plead against the King, upon the Title.

In these Writs of Quare impedit and Affize of Darrein Presentment, no special Essoign lies, for then the Six Months shall pass, and so the Church come into Lapse, for such Essoigns ought to have one Year and Day Adjournment: But a common Essoign lies in all these Casesⁿ.

Upon the Recovery of a Presentment in a Quare impedit or Affize of Darrein Presentment, he shall have a

^m Old N. B. 25.
125. Vide supra.

ⁿ 27 H. 6. 1. Kelwey 135. b. 2 Inst. 124.

Writ to the Bishop to admit his Clerk. If the Suit be against the Bishop himself, then this Writ may be to the same Bishop or to the Metropolitan, at the Election of the Party^o.

Two Judicial Writs lie here, *viz.* a *Ne admittas*, and a *Quare incumbavit*.

Ne admittas is a Writ to the Ordinary for any of the Parties, *viz.* the Plaintiff or Defendant, that he do not admit the Clerk of the other, until the Plea be discussed^p.

And^q this is to be sued within Six Months, and not after; for after the Six Months the Ordinary may lawfully present by Lapse; but if it be sued within the Six Months, the Ordinary cannot, neither can he himself collate^r within the Six Months (but after by Lapse he may), nor can he^s admit the Clerk of the other Man at any time, altho' that it be after the Six Months, and^t altho' it be found for him by a *Jure Patronatus*, which is a Commission that the Ordinary may grant to inquire who is the right Patron.

Quare incumbavit is against the Ordinary for him who sues a *Ne admittas*, and afterwards recovers in a *Quare impedit* or *Assize of Darrein Presentment*, altho' it be after the Six Months: But before^a Recovery no [147] *Quare incumbavit* lies, if the Ordinary incumber the Church, contrary to the *Ne admittas*.^b And of a Collation or Admittance before a *Ne admittas*, no *Quare incumbavit* (but only a *Quare impedit*) lies; for the Ordinary cannot have notice until the *Ne admittas* sued.^c But no *Ne admittas*, nor *Quare incumbavit*, lies in a Writ of Right of Advowson, altho' the Church become void pending the Writ, and the Bishop incumber it; for the Demandant there shall not recover the Presentment, but the Advowson; and if he hath Title to present, he may present; and if he be disturbed, he shall have a *Quare impedit*.

^o F. N. B. 38. b. f. ^p F. N. B. 37. f. ^q Ibid. ^r F. N. B. 48. l. ^s Ibid. ^t F. N. B. 48. h. ^a F. N. B. 48. e. ^b F. N. B. 48. h. ^c F. N. B. 48. q.

CHAP. IX.

*Of a Parson of a Church.**Spiritual Law.*

THE ^c Parson, when he is made, ought to be personally resident upon his Benefice.

Prerogative.

The King's ^d Chaplains, when they are attendant upon the Service of the King, are not compellable to reside.

Statute.

Artic. Cleri, cap. 8. *Accord.*

To the Parson belongeth the Church, Church-yard, Glebe, and the Tithes of all manner ^e of Annual Increase within his Parish, and also all Oblations and Obventions there, and Mortuaries, &c. And therefore by a ^f Lease of a Rectory the Lessee shall have the Tithes and Offerings of the same Church, for they are incident to it. And if a ^g Parson demise his Glebe to a Lay-man, the Lessee shall pay Tithes, for that they are of common Right. And ^h altho' a Man erects a Mill *de novo* upon his Land, yet Tithes shall be paid for the same.

Statutes.

Vide 45 Ed. 3. cap. 3. *Tithes shall not be paid of great Wood of the Age of 20 Years, or above.* [b]

2 & 3 Ed. 6. cap. 13. *Where barren, Heath, or Wasteland, which hath not used to pay Tithe for the Barrenness thereof, is converted to arable Land or Meadow, such shall not pay Tithe for seven Years after the Conversion. But where such barren Heath or waste Land hath used to pay Tithe, and afterwards is converted as before, there for seven Years this shall pay no other Tithe than was paid before the Conversion thereof.*

^c 2 Inst. 625. Co. Litt. 78. b. 119. b. ^d Artic. Cleri, cap. 8.
^e Bro Dismes 16. ^f 15 H. 7. 8. ^g 32 H. 8. Bro.
 Dismes 17. ^h Artic. Cleri, c. 5. Ante, 142. b.

Prerogative.

The ^a King shall have the Tithes in Forests, and Places out of any Parish, and shall sue for them in the Exchequer.

What arises in our Law.

The ^b Incumbent hath not in him the meer Right of the Things which he hath in Right of the Church, but the Fee-simple is in *Abeysance*, that is to say, only in the Remembrance, Intendment, and Consideration of Law : ^c So that he may not make a Discontinuance, and every Act that he does may be avoided when he ceases to be Incumbent, but such ^d as are done with the Assent of the Patron and Ordinary, which bind them perpetually.

Also if he be impleaded, he shall pray in Aid of the Patron and Ordinary, without which the Recovery shall not bind the Successor of the Parson, nor the Patron, and Ordinary *. And this is in respect of their Interest in the Church ; the ^e Patron to present, and to have an *Indicavit* of the Tithes, the Ordinary to admit and present by Lapse ; but upon *Aid Prayer* they and the Successor shall be bound, altho' they make Default, or confess the Action.

The Incumbent shall not have a Writ of Right, ^f but the highest Writ that he may have is but a Writ of *Juris Utrum*, upon the Alienation of his Ancestor, or the like.

† This Writ of *Juris Utrum* commands a Jury, as well as the Defendant, to be warned, as in the Affize of Mortdancestor. The Form of the Entry is, “ *The Jury comes to recognize whether &c. one Messuage, &c. be* [148] *Frankalmoign, &c.*” And it is of the same Nature with the Affize of Mortdancestor, that is to say, the ^a Process is Summons and Resummons, and upon Default the Inquest shall be taken ; the Defendant may ^b plead

* 22 Aff. pl. 75. *Per Thorpe.* 1 Rol. Abr. 657. Lib. Parl. fo. 19. *inter placita in Parliam. de 18 Ed. 1.* the Prior of *Carloli* and the Bishop of *Carloli's* Case. 2 Inst. 647, 651. 5 Co. 15. a. *Cawdrey's Case.* Style 137. 1 Rol. Rep. 454, 457. Vid. the Additions to Dr. & Stud. cap. 12. ^b Littlel. § 646. Hobart 7. ^c 12 H. 8. 7. Littlel. § 643. ^d Co. Litt. 143. b. ^e 12 H. 8. 7. ^f Co. Litt. 143. b. F. N. B. 49. ^g Littlel. § 646. F. N. B. 49. † See the Form. ^a F. N. B. 50. k. Ante 92. b. ^b F. N. B. 50. k. Ante 92. b.

in Abatement and over in Bar, or take the general Issue also; as he^e may plead *Misnomer* of the Demandant, or that A. a Stranger holds Parcel, not being named: And if it be found &c. then that it is his Lay-fee, and not Frankalmoign.

Statutes.

Vide 34 Ed. 1. De conjunctim Feoffatis. *If the Tenant pleads Joitenancy by Deed, the Demandant shall have Answer to it.*

Westminster 2. cap. 24. *This Writ shall lie to try if it be the Frankalmoign of another Church, as well as to try if it be Lay-fee.*

14 Ed. 3. cap. 17. Stat. 1. *Vicars, Chapel-Wardens, Provosts, Guardians and Priests of perpetual Chantries, shall have a Juris Utrum, and other Writs upon their Case, as well as Patrons, or Prebends.*

CHAP. X.

[b]

Of Consolidation and Appropriation: Therein Of a VICAR.

Spiritual Law.

THese Rectories may be either consolidate or appropriate.

What arises in our Law.

Every Consolidation and Appropriation shall be made by the Consent of the Ordinary^d.

Spiritual Law.

Consolidation^e is when the Ordinary, by the Consent of the Patron, unites one Church, which is not able to find a Chaplain, to another. And it seems, that in this Case the Consent of the King is not requisite, because herein no Prejudice is done to any; for if one Man be Patron of both Churches, he shall have the sole Presentment; if several Patrons, then they shall present by turns, and the King shall have the Lapse as before. Otherwise it is upon an Appropriation; for this is an^a

^c 12 Ed. 2. Fitz. Juris Utrum 12. ^d Plowd. 497. ^e 40 Ed. 3. 28. Finchd. 50 Ed. 3. 27. Belkn. Bro. Appropriation, 1, 2. ^a Plowd. 499. Cont.

Amortisement, and therefore ^b all ought to join when this is done.

Statutes.

37 H. 8. cap. 21. *In an Union or Consolidation of two Churches, or of a Chapel and a Church, they ought not to be distant above a Mile from each other, and also the one ought not to be above the yearly Value of 6l. and ought to be had with the Consent of the Ordinaries, Incumbents, and the Patrons of full Age, in Fee-simple, under their Writing sealed.*

An Union of a Town Corporate shall also be with the Assent of the Corporation, under their Writing.

[149] *Also the Union may be defeated, if the greater Part of the Parishioners will assure the Incumbent, within one Year after the Union, that he shall have of them annually (with that which the Church is valued at in the King's Court of the First Fruits) so much Money as shall make the Church to be of the yearly Value of 8 l.*

Appropriation is, when by ^a such Consent of the Patron (for else it is ^b void) they make some Spiritual Corporation to be the ^c perpetual Incumbent; in ^d which Case the Ordinary for the most part, by the like Consent of the Patron, hath endowed a Vicar to serve the Cure: And the Vicar shall have a *Juris Utrum*, &c. as the Parson might; upon which a *Præcipe quod reddat* lies against the Vicar only without naming the Parson, for he alone is Tenant of the Freehold, and may have a *Juris Utrum* and other Actions against the Parson; but all this is to be intended of an ancient Endowment, not where he is endowed by the Ordinary.

Prerogative.

Appropriation ought to be with the License of the King, or otherwise he shall have a Fine, and may present in name of Distress, until the Fine be satisfied *.

^b Plowd. 497. ^a 3 Ed. 3. 74. b. ^b 29 Ed. 3. 10. ^c Plowd. 496. Hob. 148. ^d 40 Ed. 3. 28. * Plowd. 499.

CHAP. XI.

Of CHURCH-WARDENS.

[b]

Spiritual Law.

THE Spiritual Law hath also Church-Wardens.

What arises in our Law.

The ^a Wardens of a Church are enabled to take Goods to the Use of the Parish, for they are charged to find many Things belonging to the Church; as Ornaments, and the like; and therefore in Reason they ought to be enabled to purchase Goods, and ^b thus far their Corporation extends. And all the Goods of the Church, that is to say, the ^c Books, Ornaments, and ^d Bells which hang in the Church belong to them, and they may have an ^e Appeal of Robbery, or ^f Trespass, for taking them away, and shall count [†] to the Damage of the Parishioners. But they may ^g not give or release them, for that is to the Disadvantage of the Church; and if they do, the ^h Parishioners may chuse new Church-Wardens, who shall have an Action of Account against them. But Church-Wardens ⁱ are not enabled to take a Feoffment, Lease for Life, or perhaps a Lease for Years, or such other Things as have Continuance.

^a 12 H. 7. 27. b. ^b Co. Litt. 3. a. March. 65. 1 Rol. Abr. 393. (1.) Wood's Com. Law 93. 8th Edition. ^c 8 Ed. 4. 6. ^d 11 H. 4. 12. ^e Ibid. ^f 8 Ed. 4. 6. Bro. Gardein. & c. 7. 12 H. 7. 27. Bro. Ibid. 6. [†] Vide Cro. El. 179. ^g 13 H. 7. 10. Cro. Jac. 234. 1 Rol. Abr. 393. (A) pl. 1. Yelv. 173. 2. Brownl. 215. Wood supra. ^h 8 Ed. 4. 6. Bro. Gardein 7. ⁱ 12 H. 7. 27. b. Bro. Feoffm. al. Use 29. Co. Litt. 3. a. 1 Rol. Abr. 393. See Duke of Charitable Uses, where a Devise of Lands to Church-Wardens to a Charitable Use was good in *Chancery*, fo. 82, 115.

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A.

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— *A Devise of a Fee Simple to Alice S. and after her Death to B. is only an Estate for Life to Alice S. Remainder for Life to B. Remainder to Alice S. in Fee; so that the Husband of Alice (if she dies in the Life of B.) shall not be Tenant by the Curtesy.*

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24, 26

— *It may not be for Things useful to the Publick, nor in Custody of Law.*

28

— *It may not be of Things Parcel of the Freehold.*

110

— *It lies not in other Land than that charged.*

ibid.

— *It may not be but upon Land in Demesne.*

ibid.

— *If the Distress be put in Pound overt, he that distrained is excused whatever Damage comes to them.*

ibid.

— *It lies of common Right for all Services.*

114

Dower, *may not be assigned reserving a Rent, or with a Remainder over.*

10

— *If a Woman who has a good Title of Dower, cause J. S. to disseize the Ter-tenant, and upon this she recovers Dower against him, yet she shall not be Tenant in Dower, for she is privy to an unlawful Act, which should be the means of her Estate.*

35

— *It may be of a Reversion dependant on an Estate for Years, and of a Rent, if any be reserved.*

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— *The Nature of the Estate.*

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— *Ad ostium Ecclesiæ.*

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— *Ex assensu Patris.*

ibid.

— *It lay against Guardian in Chivalry, not against Lessee for Years of a Guardian, nor against Guardian in Socage.*

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— *De la pluis beale.*

ibid.

— *A Feme shall be endowed of the best Possession of her Husband.*

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- *Fourcher by Essoign, what.* ibid.
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— *In an Action of Trespass against Tenant for Life, who pleads Villainage in the Plaintiff, and the Plaintiff is found Free and not a Villain, yet he in the Reversion shall not be estopped by this Verdict; otherwise in a Nativo habendo.* 21

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— *By Exception of a Thing, as in a Lease, except a Close, Woods, &c. the Law gives him means to come to the same, viz. a Way, or the like.* 46

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— *If of an Estate for Years only, tho' the Lands exchanged lie in different Counties, it is good by Parol.* ibid.

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— *He has all the Chattels of the Testator real and personal.* 149

— *At common Law, he should not have Action of Account, or Trespas of Goods carried away in the Life-time of the Testator.* ibid.

— *He may not devise the Goods of the Testator.* ibid.

— *Outlawry in the Executor forfeits not the Goods he has as Executor.* ibid.

— *The Executors are all but as one Person.* ibid.

— *In Action of Debt, Covenant, &c. against them, one should not answer without the other by the common Law.* ibid.

— *They may not have, each for himself, several Pleas in Abatement of the Writ.* ibid.

— *Their Power, as to the Time when, and as to the Things which, they shall administer, may be divided.* ibid.

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- Franchises

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— A Grant of all his Trees and Woods upon Black-Acre, which may reasonably be spared, is a void Grant, except it be referred to a third Person how much may be spared. 25

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—— *It must be directed to the Sheriff of the County, where the Causes of Action arises.* 179

E R R A T A.

FOLIO 7. line 16. for *Term* read *Town*. Fo. 8. line 26. for *to R.* read *at R.* Fo. 9. in *Notis*, for 37 *Aff.* read 33 *Aff.* Fo. 11. for *Subjuncts* read *Subjects*. Fo. 22. for *Ban* read *Bar*. Fo. 29. line 1. for *see* read *sue*. Fo. 46. in *Notis*, for 10 *Ed.* 3. 5. read 40 *Ed.* 3. 5. Fo. 49. line 3. for *their* read *his*. Fo. 51. for *unnecessary* read *necessary*. Fo. 78. in *Notis*, for 2 H. H. P. C. 509. read 309. and to 1 *Aff.* in line 2. add *pl. 6.* from line 4. Fo. 109. line 21. for *live-ry* read *liberty*. Fo. 149. for *served* read *several*. Fo. 237. line 12. for *such* read *sued*. Fo. 310. line 29. for *this* read *his*. Fo. 321. line 22. for *alio'* read *also*. Fo. 342. in *Notis*. for 14 H. 8. 51. read 15.



